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AMERICAN LAW AND PROCEDURE

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EVIDENCE

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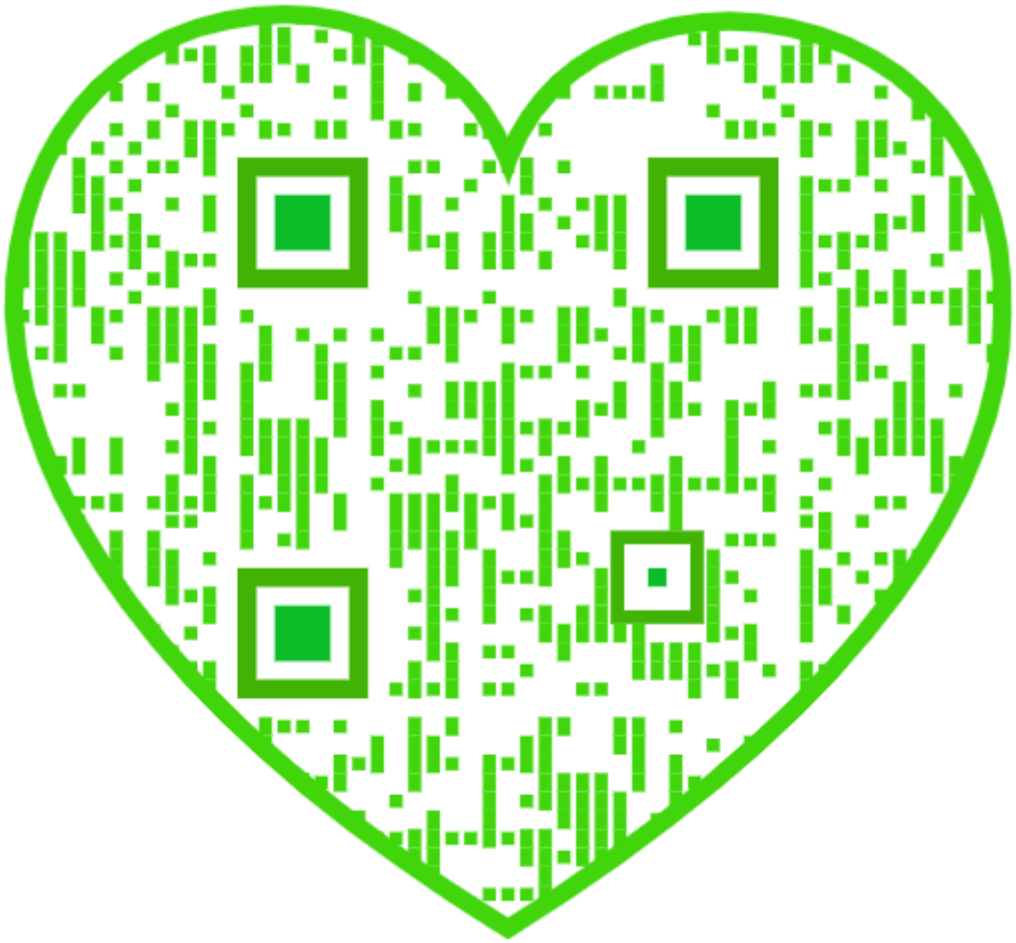

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EVIDENCE

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CHAPTER I.

NATURE OF EVIDENCE.

§ 1. **Evidence a phase of judicial procedure.** Law in general consists of two great branches: substantive law, which deals with the rights of persons, and with conduct which is an infringement of such rights; and adjective law, which deals with the methods of enforcing rights, and punishing and preventing their infringement. Inasmuch as it is the courts from which the law of the land prescribes that redress shall usually be sought, whenever legal

rights are impaired, adjective law really signifies the procedure of the courts. Like the rules of tennis or bridge whist, it prescribes the rules according to which the serious game of maintaining legal rights is played. Of this adjective law, Evidence is a part.

§ 2. **Relation of evidence to pleading.** It is important to note the relation between evidence and pleading, another branch of adjective law which is treated elsewhere in this volume (1). Pleading precedes evidence. It consists of the formal statements of the parties, now made in writing before the trial, by which their positions are set forth and the exact issues of fact between them are disclosed. The function of evidence is to resolve those issues in favor of one party or the other. Let us suppose a case in which A sues B for the alleged contract price of a horse. B in his plea (answer) avers that the horse was warranted to be sound, but it proved to be lame. The issue then raised by the pleadings is as to the animal's soundness. If, on the trial, C testifies that he saw B driving the horse after A avers that he delivered it, and the horse showed no limp or halt but drew the carriage in which B was driving with style and speed, that is evidence which should help the jury to decide the issue of soundness in favor of the seller. On the other hand, if B testifies that, although the horse usually started smartly, it always limped shortly after, that would be testimony tending toward a contrary conclusion. In another place we shall have something to say about the effect of conflicting testimony, and the determination in such a case of where the truth lies. The point to

(1) See the article following in this volume.

note here is that the evidence follows the pleadings and is confined to the issues which the pleadings have made.

§ 3. **Evidence limited by the pleadings.** It is a consequence of this rule, that evidence cannot be introduced to refute allegations in the pleadings of one party, which the other party by his pleadings has admitted, either expressly or by implication. For instance, if, in the case put, B pleads that, although the horse was delivered, it was unsound; or, if he merely avers the unsoundness, he cannot on the trial offer evidence of non-delivery, because A, in his declaration filed as the first pleading in the case, must have alleged that the horse was delivered, and B, not questioning the fact of delivery in his plea, will be deemed to admit it. What a party admits by his pleadings, he cannot afterward deny by his evidence. Otherwise there would be no end to the matters which might be gone into on the trial, and the whole object of pleading, which is to simplify the issues and also to apprise the parties on which points to prepare for trial, would be lost.

§ 4. **Evidence limited by admissions in open court.** Sometimes, at the trial of the case, one party or the other, either to expedite the trial or because he is convinced of some one or more facts and deems it useless to deny them, will admit allegations of the other. Such admissions made in open court, or sometimes by a stipulation or written statement signed by the parties or their attorneys and filed in court, are binding, to the same extent as admissions in the pleadings. They have the effect of excluding evidence as to the points which they cover, and confining it to those points which are actually in dispute.

§ 5. **Evidence is matter of fact presented to judicial tribunals.** The purpose of evidence and its relation to the pleadings are the best indication of what evidence is. Without refining over a matter of definition, it seems approximately correct to say that evidence, in the legal sense in which we are interested in it, is any matters of fact or alleged fact presented for the consideration of a court or jury to aid it in the determination of issues of fact. Evidence may take various forms. It may be, and most commonly is, testimony or statements by witnesses in court under oath, but it may also be a thing, such as a writing, or a photograph, or a building to be condemned, which the jury may be taken to see in order to fix the value. Whatever it is, it is either in itself a fact, as in the case of the building, or it is the reproduction of facts, as in the case of the photograph and the testimony of witnesses. The testimony may be mistaken or even deliberately false—such is the infirmity of human nature—but it always purports to be a statement of fact, and a large part of the work of the courts consists in distinguishing, as accurately as possible, what is really fact from what is error or falsehood.

§ 6. **Difference between evidence and argument.** It must be apparent that the courts are aided in the decision of issues of fact not only by evidence but also by the arguments of counsel, and it is a natural inquiry what is the distinction between the two. The difference is this: Evidence, as has been stated, consists of matters of fact or at least purported matters of fact, and, to insure a reasonably close approximation to fact, it must be given in general by

persons with first-hand knowledge, under the solemnity of an oath. Argument, on the other hand, is not fact or even an original statement of facts, but is a discussion as to the effect of the facts brought out in the evidence, and is dependent upon them; it is not, like evidence, information, but is rather inferences and conclusions in regard to information.

To illustrate: In our perhaps outworn horse case, witness C testified that the horse seemed to him to be sound; and witness B, also the defendant in the case, said that the horse always went lame after being driven a short time. That was the evidence in the case, given by men who had observed the horse and personally knew whereof they spoke. The lawyers for A and B, on the other hand, did not themselves know the horse; probably they never saw it. Instead of presenting facts for the consideration of the jury and court, they took the facts which were given them; their part was to aid the jury in reaching conclusions from the facts presented by the witnesses. So B's lawyer, contending that the horse was unsound, would argue that C seldom saw the horse, that very likely the time when he saw it happened to be when it had not been driven far, and that B driving it constantly would be much more likely than C to know whether it was sound. On the other hand, A's lawyer would argue that B's interest in the suit warped his judgment, and that C, being a disinterested party, was more likely to be right. Thus each lawyer would give, not facts, but his construction of the facts in evidence, and endeavor to make it the view of the jury. The distinction here illustrated obtains generally. Evi-

dence is real or purported matters of fact, while argument is reasoning in regard to the facts.

§ 7. **Direct and circumstantial evidence.** In the present age, circumstantial evidence figures largely in newspaper impressions of courts of justice. Wherein does it differ from what is called direct evidence? Direct evidence is evidence which tends to establish directly a fact in issue, whereas circumstantial evidence tends to establish a fact from which the fact in issue can be inferred. Let us suppose a case in which A is on trial for killing B. C testifies that he saw A shoot B; that B fell instantly, and that, when C ran up, he found B dead with a bullet wound in his temple. That is direct testimony because, without the necessity of inference, it tends to establish the main fact in issue, the killing of B by A. On the other hand D did not see the incident, but he testifies that previously A had told him he would "get even" with B, because B inveigled him into a worthless mining deal. He also testifies that, a few minutes after the shooting was alleged to have occurred, he saw A walking rapidly toward the outskirts of the town; that as A passed a clump of bushes he threw something into it which glistened; that a little farther on A unhitched a horse and buggy tied to a tree beside the road, jumped in, and drove away at a gallop; that D, being then impelled by curiosity, looked under the bush and found a 38 calibre revolver (the same calibre as that of the bullet extracted from B's skull at the autopsy). This testimony of D does not in so many words establish the crime charged against A, but it shows a motive for the killing in A's hatred of B, and subsequent conduct which lends color to the

theory of A's guilt. In other words it establishes facts, in A's hostility and A's movements immediately after the incident, from which A's guilt might be inferred.

§ 8. **Weakness of circumstantial evidence.** It is apparent that this inference is far from conclusive. Many a man has borne a bitter grudge against another without shooting him, and A's subsequent movements were not necessarily referable to his killing B. His haste might have been due to a business engagement in the next town which he was barely in time to keep; and he might have thrown away the revolver simply as a matter of precaution, seeing the shooting, fearing he might be wrongfully suspected if the revolver were found on his person, and thinking he was unobserved when he cast the weapon aside. This may seem improbable, yet it is not impossible, and it indicates the chance of error in circumstantial evidence. In the case put, with the direct testimony of C, it would seem to leave no doubt of A's guilt; by itself, without corroborative evidence, it would hardly prove A's guilt beyond a reasonable doubt. So skeptical are some persons of circumstantial evidence that, as jurymen, they would not vote a conviction on circumstantial evidence alone, however strong the chain of circumstances might seem. It is common, in important trials, for prospective jurors to be rejected on the ground that they would not give such evidence its due weight. Moreover, there is one crime of which a conviction can never be obtained on circumstantial evidence alone: the Constitution of the United States requires that for a conviction of treason there must be the

testimony of two witnesses to the same overt act or a confession in open court (2).

§ 9. **Degree of difference between circumstantial and direct evidence.** While ordinarily, therefore, direct evidence might seem to be more satisfactory than circumstantial evidence, this does not by any means tell the whole story. In the first place, the difference between the two is more a difference of degree than of kind. C says that he saw A kill B; that we call direct evidence. What he really saw, however, as he will state when he tells his story in detail on the witness stand, was a revolver raised by A, a flash followed by a report, and B falling, and from these circumstances we infer that A killed B. The inference is automatic and instantaneous, instead of conscious and delayed, as in the case of the inference from A's hatred of B and his subsequent conduct, but it is still an inference.

§ 10. **Strength of circumstantial evidence.** More important than this theoretical consideration is the fact that circumstantial evidence is sometimes the only evidence available, and that, if properly scrutinized and weighed, it may be practically as safe a guide in the solution of issues of fact as direct evidence. For instance a watch is taken from A's residence during his absence. No one sees the theft, but B pawns the watch the next day. He is arrested and A identifies the prisoner as a man whom he saw at the nearest corner when he went out; he also identifies the watch pawned by B, as his own; C completes the chain when he sees the prisoner, and remembers that he noticed him coming down the walk from A's residence a

(2) U. S. Const., Art. III, sec. 3.

short time after A says that he left it. This circumstantial evidence, unless explained, would be to most reasonable men satisfactory proof that B was the thief.

Sometimes circumstantial evidence may be even more convincing than so-called direct evidence, because less subject to bias. A street-car company is sued for a collision of one of its cars with an automobile at a crossing, and one of the issues is the speed of the street-car at the time of the accident. The motorman says that the car was barely moving, but several witnesses, although they did not notice the car before the accident, heard the crash of the collision, and, turning toward the sound, saw the automobile hurled thiry-five or forty feet. The effect on the automobile is only a circumstance, but it must be apparent that it is a far more reliable criterion of the speed of the car than the direct testimony of the motorman. The latter is strongly influenced by the personal equation; he has his reputation as a careful employee, possibly his position at stake, and he would be more than human if he did not minimize the speed of his car. On the other hand, it is as certain as gravity that the automobile could not have been carried the distance that it was, unless the street-car which struck it had been moving at high speed. We should reject the testimony of a dozen witnesses that the car was moving slowly, sooner than recede from this conviction, because it is based on an impersonal and unvarying law of cause and effect.

Circumstantial evidence may thus, on occasion, be of superior value to direct testimony; and again, where direct testimony is available and unbiased, it may be more satis-

factory than circumstantial evidence because it furnishes proof of the precise point that we want to know. In any event, both kinds of evidence are constantly presented to the courts, and usually in conjunction. The distinction between the two, though real, often becomes shadowy, and is probably less regarded by practitioners than it is by strangers to the courts.

§ 11. **Limitation of evidence by rules.** It has already been shown that evidence consists of matters of fact, bearing on the disputed questions raised by the pleadings. But not all such matters of fact will be received and considered by the courts. If B is charged with stealing A's overcoat, it might seem pertinent to show that shortly before he stole a suit from C. There is undeniably a certain likelihood that a man who has stolen once will steal again. Yet such evidence, as we shall see later, would be inadmissible, and this is only one instance in which matters bearing upon cases before the courts are excluded, because, in the eye of the law, they are more likely to do harm than good. This policy of exclusion is now expressed in certain rules of evidence, which have been developed hand in hand with the Anglo-Saxon jury system.

§ 12. **Rules of evidence developed with the jury system.** The jury in the beginning consisted of men chosen from the vicinity of the controversy, who, as far as possible, were acquainted with the parties and the facts involved, and used their own knowledge as well as the testimony of such witnesses as might appear before them, in deciding the issues. Gradually the character of the jury changed, until to-day the country is scoured to secure jurors who are

absolutely ignorant of the cases on which they sit. That is they are now merely triers of the facts, which they gather exclusively from the evidence. As this change progressed, the jury becoming more dependent on witnesses and able to rely less on their own information, the judges who presided over their investigations became solicitous lest matters should be presented to them which might be misleading. When the jurors could correct the impressions of witnesses by their own knowledge, there was comparatively little danger that they would be led astray. Without this corrective, however, they would be far more subject to mistaken notions from the evidence, and testimony which could safely be submitted to judges, accustomed to weighing testimony and discriminating between the reliable and the unreliable, might lead to serious error on the part of men unlearned in the law and not practiced in such discrimination.

Let us assume that B is charged with assaulting A. C testifies that at the time of the assault he saw B in another town. D offers to testify that E told him that he saw B commit the attack on A. The second statement clearly has a tendency to show that B assaulted A, but it is only second-hand evidence. D knows nothing about the matter of his own knowledge, E is not present before the court where he can be examined, and there is a strong possibility that D is not able to repeat E's statement exactly as it was made. If the evidence were submitted to a judge, who could take all these elements into account, it might be proper for consideration for what it was worth, but a jury might be struck by the idea that E had seen B commit the

attack, overlooking the hearsay character of the testimony, and thus allow the reported statement of E to prevail over the first-hand testimony of C to an alibi, to the serious detriment of the accused. Therefore the offered evidence of D is inadmissible.

§ 13. Object of rules of evidence to save jury from error. Possibly the discernment of the jury has been underrated; possibly allowance would be made by juries for the hearsay character of evidence, if such evidence were admitted, and it would certainly seem that it would be in the case put But actual cases are less clear, more complicated; discernment is less easy, and a glance at the juries who try many, perhaps most of our cases, does not inspire confidence in their ability to make nice intellectual distinctions. At any rate, for the simplification of the jury's task and the protection of litigants from the misguided action of jurors, a definite code of rules has grown up. To-day this code applies not only to jury cases, but also, with some relaxation, to trials by the court without a jury. Nevertheless, it seems designed primarily for the jury. In the words of an English judge: "By the rules of evidence established in the courts of law, circumstances of great moral weight are often excluded, from which much assistance might in particular cases be afforded in coming to a just conclusion, but which are nevertheless withheld from the consideration of the jury upon general principles, lest they should produce an undue influence upon the minds of persons unaccustomed to consider the limitations and restrictions which legal views upon the subject would impose" (3).

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(3) Wright v. Doe d. Tatham, 1 A. & E. 375.

Though these rules, if viewed apart from their origin, may in some cases seem arbitrary, there was in the beginning and usually is now a reason for them; they are an application of rough Anglo-Saxon common sense. It will be our endeavor, in the development of the subject, not merely to state the rules, but, as far as possible, to disclose the underlying reasons.

§ 14. **Value of knowledge of rules of evidence.** It is obvious that to the practicing lawyer knowledge of the rules of evidence is indispensable; they are, as has been said, the rules of the game which he plays. But familiarity with the general principles of admitting and excluding evidence is helpful to everybody, who by any chance may be called upon to defend his rights in the courts. For instance there are certain rules governing the introduction in evidence of written instruments. Knowing these, a person executing a writing of any importance will preserve it, in either the original or a copy, in such shape that it can be proved. Furthermore, if the time comes when he has a grievance which he contemplates taking into court, he can determine whether he has facts which are both admissible and sufficient to prove his case; and, even if at this stage he consults a lawyer, as any prudent man would, still he can confer more intelligently, is in a better position to be advised, can cooperate more effectively in preparing the case, and will make a better witness in his own behalf. The frequent trial, sometimes almost despair, of lawyers is the failure of their clients, good business men as they are, as witnesses. They want to state the points of their case in a form which the court will not receive, and

when they are corrected and admonished to avoid their error, told, for instance, to state what happened and not what they thought about it, they become so confused and halting that most of the effect of their testimony is lost. This misfortune could nearly always be avoided by a little knowledge of the rules of evidence, with a little previous thought and a little common sense.

CHAPTER II.

RELEVANCE OF EVIDENCE.

§ 15. **Distinction between relevance and competence.** Evidence may be regarded from two standpoints, in reference to its admissibility: first, the standpoint of subject matter; and second, that of form. Unfortunately, there are no terms which describe, precisely, evidence which satisfies the scrutiny of the courts from these two points of view, but the words "relevance" and "competence" will serve the purpose roughly. Relevant evidence, as the term indicates, is evidence the subject matter of which relates to the issues. In a legal sense, relevance signifies something more, for not all matters which logically relate to the case in hand are admissible. They must relate sufficiently to warrant the court in taking time to investigate them, and they must not tend to distract it from the main issues. In other words "relevance" means "sufficient relevance," as will be more fully explained shortly. This is a flaw in our terminology, but "relevant" is the word used by the courts, and, with the qualification suggested, need not be misleading. "Competence" is a general term used by judges and lawyers in a variety of ways and often to include relevance, but it may properly be used also to indicate compliance with the rules of law as to the form of evidence irrespective of the subject matter, and it will

be taken in that sense in this article. Competent evidence will be regarded as evidence offered in a form which the courts will admit.

§ 16. **Same: Illustration.** The distinction will be clearer from illustration. Assume that the issue in a given case is whether A signed a contract offered in evidence. Testimony of B that A was a man of generous disposition is not relevant, because the subject matter of the testimony is foreign to the issue, whether or not A signed the contract, and throws no light on that question. On the other hand, testimony of C that D told him that he saw A sign the contract is relevant, because it bears directly on the issue, but it is incompetent because it is only hearsay evidence of the subject matter, and hearsay under the rules is inadmissible. This illustration may suggest another point in regard to the distinction between relevance and competence: namely, that relevance is a logical and flexible requirement, the application of which depends upon the facts of each individual case, whereas the requirement of competence, being based upon definite rules, has almost the rigidity of a statute, operating upon the form of the evidence without reference to the subject matter in particular cases. There are exceptions to this difference, as in the case of evidence of character of the parties to a suit, where it will be shown later that hard and fast rules on the subject of relevance have grown up, but, in general, the distinction obtains. We now pass to consider relevance more in detail, reserving the subject of competence for the following chapters.

§ 17. **Degree of relevance requisite.** It is easy to say that evidence must be relevant to the issues, but this does not advance us far, because we then have to determine how far relevant. Relevance is of varying degrees. A sues B, a street-car company, for ejection from one of its street-cars; C, the conductor, testifies that he put off A because he refused to pay his fare. That is clearly relevant to the issue whether or not the ejection was justified. Thereupon, the company attempts to show that A has previously been ejected from a railroad train for non-payment of fare. This evidence bears on the issue, because a man who tries to "beat his way" once is likely to do it again; the habit may be chronic. On the other hand, the earlier incident has only a problematical bearing on the later. A, ejected from a railroad car, is about as likely not to attempt the same fraud on a street-car as to attempt it, and, when it is possible to get the testimony of A himself, of C, the conductor, and of passengers and bystanders as to the ejection from the street-car in dispute, the connection of the prior incident would seem too slight and the possibilities of erroneous inference from it too great to admit it in evidence (1). This illustration will explain the previous statement that more than mere relevance is required of evidence. It is hard to conceive that evidence would ever be offered, which would not be relevant in the sense that it would bear in some way upon the issues. To be admissible it must bear fairly directly. There is no rule of thumb to determine how directly, and no precise test can be

(1) Sprenger v. Tacoma Traction Co., 15 Wash. 660.
(2) Columbia R. R. Co. v. Hawthorne, 144 U. S. 202.

given, because as has been intimated, everything depends upon the facts of each individual case and what is reasonable under its special circumstances. Perhaps we can hardly come closer to a principle than to say that those matters are admissible, which are not trivial and which our judgment tells us are more likely to help toward the correct decision of issues of fact than to mislead. Matters which have only a slight or conjectural bearing on the issues are inadmissible, especially if they are calculated to prejudice the jury against one party or the other.

§ 18. Same: Further illustrations. Thus, it has been held, in a case in which an employee of a saw-mill sued the owner for negligence in providing a defective machine, as a result of which the employee was injured, that it could not be shown that subsequently the machine was repaired (2). Such repairs might seem to imply a recognition of previous neglect; but, on the other hand, as was said by the supreme court of Minnesota: "A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards" (3). Therefore, the evidence would be more likely to create an unthinking prejudice against the defendant, than to enlighten the jury as to whether or not it was exercising due care. Likewise, in a similar suit against a corporation for damages due to alleged negligence, it cannot be shown that the defendant carried accident or liability insurance (4), because it is

(3) Morse v. Minneapolis & St. Louis Railway, 30 Minn. 465.
(4) Sawyer v. Arnold Shoe Co., 90 Me. 369.

customary for manufacturing corporations to carry such insurance, covering even the negligence of themselves and their employees. They do it simply as a matter of business policy, and the fact has little or no tendency to prove negligence in a particular instance.

§ 19. **Prejudicial evidence.** It is a natural inclination of lawyers, especially in jury cases, to introduce matters which, whether or not they relate closely to the issues, may influence the jury in favor of their client. In the arguments of counsel, which are given a rather wide latitude, this tendency is especially manifest. The ends of justice are, however, usually subserved, if prejudicial matter is kept out of the evidence, because the jury are instructed that argument is not evidence and should be disregarded, except in so far as it is based upon the evidence, and they usually grasp this idea. Just because of this fact, it is of the highest importance that the evidence be kept fair and that the requirement of a close relation between the evidence and the issues be enforced. The task is by no means easy. The lawyer, prosecuting a personal injury suit against a corporation, will attempt by every means in his power to inject evidence of the plaintiff's poverty and the defendant's wealth, hoping that the jury, out of compassion, will award his client something in the verdict without much regard to his deserts. Yet all such considerations should be and usually are sternly excluded from the evidence. It is the jury's duty, in personal injury cases, not to give away other people's money to the unfortunate, but to decide when money is due for the redress of wrongs. The decision obviously will be correct, only when it is based on

the facts of the alleged injury, and not on collateral facts disturbing to the judgment.

§ 20. **Same: Illustrations.** Thus, in an action for injuries to a pedestrian from a street-car, testimony was given that it was a good thing that the motorman did not get out of the car after it stopped, as otherwise he would have been mobbed. But on appeal the decision was reversed, because the admission of this evidence was improper (5). The animosity of bystanders toward the motorman had, of course, a slight tendency to show that he was in the wrong, but very slight, because probably few or none of them had actually observed the circumstances of the accident; and, such is the mob spirit, that rumor or the denunciation of a single man might account for the hostility of the whole excited crowd. Without showing, therefore, whether the injury was really the fault of the motorman, for which the company would be liable, such testimony would give the jury the impression that the motorman was guilty, and therefore would be highly prejudicial to the company.

In another case a man was on trial for murder. The killing was admitted and there was no evidence of self-defense, but the defendant's counsel attempted to show that the deceased was a man of violent and dangerous character and had threatened the defendant. The evidence was excluded (6) because threats, even when made by a dangerous man, do not justify another in killing him. One may kill in self-defense, only when in imminent peril

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(5) Waddell v. Metropolitan St. Ry. Co., 113 Mo. App. 680.
(6) State v. Byrd, 121 N. C. 684.

of life or limb and, when no actual attack is shown or no immediate danger of attack, no evidence of hot temper or general threats by the victim is sufficient. Therefore, while such testimony would have only a slight logical bearing on the case, if any, it might result in the unmerited acquittal of the defendant by giving the impression that he had rid the world of a bad man.

§ 21. **Evidence of similar facts.** We have thus seen that evidence to be admissible should bear in a fairly direct way upon the issues, and that it is to be scrutinized with special care where it is likely to excite the emotions or prejudices. Questions very often arise as to the admissibility of matters similar to the matter in issue and yet distinct from it. X is charged with speeding his automobile on A street, near B street; testimony is offered that on the same day he was exceeding the speed limit on H street, two miles away. Is it admissible? In general it may be said that evidence of similar acts or circumstances is not admissible, because, although there is a general similarity, there are too many differences to insure that what holds true in one case will apply in the other. Where, however, the analogy is so close that differences are practically eliminated, the evidence may be allowed. It certainly could not be shown, in the case put of the trial of X for speeding his automobile on A street, that he was speeding it two miles away, because everybody knows that the speed of automobiles is varied frequently, and the chance is practically just as great that X slowed down his machine in the two miles, as that he maintained the excessive speed. On the other hand, evidence that he was speeding the automobile

at another point in the same block might be admissible, provided there was no obstruction or change in the character of the street between the two points. There is at least a reasonable probability that, under such conditions, the driver would maintain the same speed throughout the block.

§ 22. **Same: Illustrations.** A similar distinction is illustrated by two actual cases of intoxication. In a suit for damages sustained by a collision with a street-car, evidence that the plaintiff was intoxicated on previous occasions was refused (7). Intoxication is not a constant condition, even with habitual drinkers. Such men vary between intoxication and sobriety, and evidence that the plaintiff was drunk at another time had only a slight tendency to sustain the defense that he was drunk, and so not in the exercise of due care, at the time of the accident. On the other hand, in a suit on a contract, testimony that, just previous to the time of executing it, the defendant had been drinking excessively, was held admissible (8) on the issue, whether he was drunk and irrational at the time of the signature. Everybody knows that the effect of excessive drinking does not pass off for some time, so that the testimony had a strong tendency to prove the defense for which it was offered.

There are countless other illustrations of the rule that the similarity must be close to permit evidence of similar facts. In condemnation cases, where the issue is the value of a particular piece of land, evidence of the value of land

(7) Shelby v. Brunswick Traction Co., 65 N. J. L. 639.
(8) Rogers v. Warren, 75 Mo. App. 271.

of the same general character in the same vicinity is admissible, whereas the value of altogether different land is not. Thus, on the question of the value of land used for residence purposes, the value of land available for manufacturing is not proper, because values in the two cases are fixed by very different considerations. On the whole, the courts are rather liberal in admitting evidence of similar facts where land values are in issue, because, although there are always individual differences between different lots, evidence of the value of lots similar in a general way is usually the most certain evidence available, and the best that can be done is to take it, allowing approximately for the differences. This is true, however, only of unimproved land. When land is built upon, it cannot be taken as any criterion of the value of other land even adjoining, because, to determine how much of the value is in the land and how much in the improvements, would call for investigation in itself and thus complicate the issues. If the land is sold, apart from the buildings, the sale may be admissible; but otherwise, in fixing the value of a given piece of land by sales of similar land, the courts are limited to land which is unimproved.

§ 23. **Evidence of similar facts in criminal cases.** In criminal cases, where it is well known that it is the policy of our law to give ample protection to the rights of the accused person, evidence that the prisoner has committed one crime is inadmissible to show that he has committed another even of the same kind. In a New York case, one Sharp was charged with offering a bribe of $20,000 to a member of the city council, to induce him to vote for a

grant to the Broadway Surface Railway of the right to construct a street railway, and, on the trial, the prosecution was allowed to show that a year previous the defendant had proposed to the engrossing clerk, in the lower house of the legislature, to give the latter $5,000 if he would alter a bill then pending, so that it would authorize the construction of a street railroad on Broadway. On appeal the evidence was held improper, and the judgment of conviction was reversed (9). There can be no question that the fact, that the prisoner had previously offered a bribe, showed a willingness to resort to corrupt methods, and to that extent rendered it more probable that he was guilty of the crime charged. But the law regards the inference, that because a man has committed a crime once therefore he is likely to do it again, as too inconclusive to be allowed when his liberty or life is at stake. Accordingly, he is permitted to make his defense to the specific crime charged, without fear that his former misdeeds will be brought up against him.

§ 24. **Evidence of similar acts admissible to show intent or motive.** Even in criminal cases, however, evidence of similar acts is sometimes admissible to show, not ordinarily the commission of another act of the same kind, but the intent or motive with which such other act, which must be proved by other evidence, was committed. Thus, where the defendant was charged with pawning as a diamond ring one which was only imitation, he pleaded in defense that he did not know that the ring was false, but believed the assertion of a man who employed him that it was

(9) People v. Sharp, 107 N. Y. 427.

genuine. To prove the prisoner's guilty knowledge, the prosecution then offered evidence that he had shortly before offered other false articles to other pawn brokers, and the evidence was held admissible (10). The pawning of the ring as genuine and its baseness were shown by other evidence, and the evidence of similar transactions had a legitimate tendency to show that the prisoner had acted deliberately, with a purpose to deceive, and not under mistake as he averred. The court well stated the force of such evidence as follows: "It is not conclusive, for a man may be many times under a similar mistake, or may be many times the dupe of another; but it is less likely he should be so often, than once, and every circumstance, which shows he was not under a mistake on any one of these occasions, strengthens the presumption that he was not on the last."

On the same theory, where suit was brought for the amount of a note, and the maker pleaded that the note was given for a balance due on gambling transactions in grain and was therefore illegal, it was held proper to show that there was a continuous chain of similar transactions between the same parties (11). The fact that the parties had been gambling for a considerable period, and adjusting balances from time to time, was certainly corroborative of the defendant's statement that the note in suit was given in settlement of such an account.

§ 25. **Evidence of similar acts admissible in case of a common scheme.** Generally, where two transactions are shown to be parts of a common scheme, evidence of one

(10) Queen v. Francis, L. R. 2 C. C. R. 128.
(11) Gardner v. Meeker, 169 Ill. 40.

is admissible to show the prisoner's guilt of another for which he is on trial (12), although, as has been shown, evidence of an independent criminal act, notwithstanding it may be in certain respects similar, is not admissible. Thus, if a prisoner is charged with selling spurious railroad stock with intent to defraud, it could hardly be allowed in evidence that, at another time, he passed counterfeit money, because the one act has little relation to the other; but it certainly could be shown that he offered the spurious stock at about the same time to other persons than the one named in the indictment; and it probably could be shown also that, with the stock, he offered to the same persons bogus deeds to valuable city property. The two acts would be simply different branches of one scheme to amass wealth by fraud, or in other words, to "get rich quick."

§ 26. **Evidence of similar occurrences admissible to show notice.** We have just seen that evidence of similar acts is admissible to show the intent with which another act is committed. On the same principle, where, as frequently happens in personal injury cases, it is necessary to show, not only that the accident was due to a lack of safety in premises under the control of the defendant, but that the defendant knew or ought to have known of the danger and guarded against it, evidence of other accidents due to the same cause is admissible on the latter branch of the case. When the District of Columbia was sued, on account of a death resulting from a fall at night on a sidewalk where there was an unguarded descent of two feet,

(12) Frazer v. State, 135 Ind. 38.

it was held proper to show that other persons had stumbled at the same place, and one woman had fallen and been sent home in a carriage (13). Possibly this evidence did not show that the place was dangerous; the persons who stumbled might have been careless. But the occurrence of these other accidents was certainly sufficient to put the defendant on notice that accidents might happen, and require it to repair the sidewalk if, in fact, it was dangerous to persons of ordinary care.

§ 27. **Evidence of custom: Admissibility and weight.** In determining the rights of parties in any particular transaction, it is natural to inquire what is customary under such circumstances, and such evidence is usually admissible, because the standard of conduct of men in general is a fair criterion of what is required of any particular man. It is not, however, conclusive. For instance, in a personal injury case, one of the issues is whether the acts or omissions of the defendant constitute negligence. This depends upon whether he exercised the degree of care which reasonable prudence would require; if he is a driver of an automobile, not whether he drove his machine as carefully as many other men drove theirs, or even as it was customary to drive, but whether he drove it as carefully as a reasonably careful man would drive it. The second degree may very conceivably be higher than the first. It is well known that many chauffeurs drive automobiles recklessly, and, if their acts, frequent though they may be, could be put in evidence under the cloak of custom as the absolute measure of care required by the law, the dan-

(13) District of Columbia v. Armes, 107 U. S. 519.

ger to the public from automobiles would be even greater than it is. In other words, a man's duty to refrain from imperiling his neighbors depends not on what other people actually do, but on what a man of ordinary prudence would do in his situation. The first, that is custom, is not necessarily decisive of the second, which is duty. It is, however, usually an indication which is proper to go to the jury for such weight as they may give it. It is only necessary to impress the idea that it is not conclusive evidence, and that, if customary conduct, which may be customary carelessness, falls short of the standard of conduct which ordinary prudence requires, custom will not excuse a breach of the higher standard.

§ 28. **Same: Illustrations.** Thus, in a suit against a railway company for damages sustained in a collision, it was contended by the railroad that it was required to exercise only that degree of diligence which was customary and sanctioned by the general usage of railroads. But the court held that, while evidence of custom might bear on the question of whether or not the defendant exercised due care, "such practice cannot be taken as conclusive upon the inquiry as to the care which ought to have been exercised. A degree of care ordinarily exercised in such matters may not be due, or reasonable, or proper care, and therefore not ordinary care, within the meaning of the law" (14). In another railroad case, damages were claimed for the death of a conductor who fell from a train as he was climbing a ladder on the side of a box car. It appeared in the evidence that, just as he reached up one hand for

(14) Wabash Railway Company v. McDaniels, 107 U. S. 454.

the top rung which was probably missing, he let go his hold of the ladder with the other hand and consequently fell. There was therefore an issue as to whether he exercised due care in taking off one hand before he had reached the ladder with the other. Under this state of facts, testimony was admitted that the deceased was ordinarily a careful man. On appeal, however, the judgment was reversed. The evidence not only, as in the other railroad case, was not conclusive; it was not even admissible (15). On the question whether a given course of action constitutes due care, evidence that it is the course ordinarily followed under the circumstances, although it may not be conclusive, certainly is admissible; but evidence that a man is ordinarily careful has only a slight tendency to show that his conduct in a particular situation was careful, and, if allowed, might overweigh with a sympathetic jury the far more reliable evidence of his behavior in the incident in question. It is therefore rejected altogether.

§ 29. **Same: To show value of services.** Evidence of custom is admissible and very persuasive in suits for services rendered, where there has been no definite agreement as to compensation. A lawyer draws a contract or settles a suit for a client; no fee has been fixed or even mentioned. Under such circumstances, the lawyer is entitled to the reasonable and customary fee for the kind of service which he has performed. Of this, custom is in the nature of things a strong determining element. Doctors, architects, and all other professional and business men rely upon it to a considerable extent to establish claims for services

(15) Southern Kansas Railroad Company v. Robbins, 45 Kans. 145.

performed in the absence of express contract. Naturally, as we pass from the professions, and especially from the fine arts and letters to business, the more definite is the value set upon services of various kinds, and the clearer and more consistent evidence of custom becomes.

§ 30. **Evidence of character in criminal cases.** Evidence of character, whether it seems relevant or not, is always allowed in behalf of the defendant in a criminal prosecution. Evidence of bad character cannot be introduced against him, except in rebuttal, but evidence of good character is admissible in his favor. On theory, such evidence should not be allowed in either event, where the facts of the alleged offense are in evidence, because it is of little consequence that X testifies that A is reputed to be an honest man, if Y swears that he saw him steal B's watch. Such testimony would seem to have the worst vice of irrelevance in that, while tending only remotely to acquit A of the specific charge of stealing the watch, it might enlist the sympathy of the jury in his favor and result in either an unmerited discharge or a sentence much below his deserts. Yet such evidence has been allowed from time immemorial, in keeping with the Anglo-Saxon policy of giving the prisoner the benefit of every doubt. To quote a leading case: "The allowing evidence of good character has arisen from the fairness of our laws and is an anomalous exception to the general rule" (16).

§ 31. **Character proved by evidence of reputation.** "Character" evidence, in legal parlance, does not refer to character in the usual sense of the word, but to reputa-

(16) Regina v. Rowton, Leigh & Cave, 520.

tion or the general estimate of character. Probably, in the beginning, the courts allowed evidence of a defendant's actual character or disposition from one who knew him. But in 1865 the case of Regina v. Rowton (note 16, above) limited the "character" evidence admissible in England to reputation. On a trial for assault, after the defendant had introduced witnesses to his good character, a witness was asked by the prosecution in rebuttal about the defendant's general character for morality. He replied that he did not know the neighborhood's opinion, but that his own opinion was that the man was capable of the most flagrant immorality. The reviewing court held that the evidence was inadmissible; that testimony as to character "must be restricted to the man's general reputation and must not extend to the individual opinion of the witness."

§ 32. **Same: Comment on rule.** It might seem difficult as a matter of logic to justify this rule. Most of us would give more for the opinion of one reliable man, based on acquaintance, than for any amount of testimony to mere reputation. But possibly the theory is that the community opinion, being a composite estimate of both friends and foes, in which prejudices for and against the defendant may be expected to neutralize one another, is fairer and less biased than any individual judgment. We all know that this is only a rough approximation to the truth, but, whatever we may think of the reason, the rule exists generally, both in England and the United States, that it is a man's good *reputation* and not necessarily his good *character* of which he may introduce evidence when he is charged with a crime. In practice, evidence of actual dis-

position and character is often heard, but it is by sufferance, and the limitation of "character" evidence to reputation remains the law.

§ 33. **Same: Details of rule.** It goes without saying that the reputation offered must relate to the kind of offense for which the prisoner is tried; thus, on an indictment for forgery, it would be immaterial that he was reputed to be kind, or, for murder, that he had never been suspected of stealing. The reputation must be as to honesty in the first case, and gentleness in the second. One more point: It has been stated that the prosecution cannot, in the first instance, adduce testimony of the bad reputation of the prisoner—the opportunity to present character, or, more accurately, reputation evidence, being a special favor to the accused. But if the defense opens the door to such evidence, in the effort to prove the good reputation of the prisoner, the prosecution in rebuttal may retaliate and put in all the evidence it can get to show the opposite. More than one defendant has been surprised and disappointed by this unexpected recoil of character evidence.

§ 34. **Character evidence in civil actions.** In civil suits for the recovery of money or the imposition of a pecuniary penalty, evidence of good reputation is not allowed in behalf of the defendant, even though the offense is the same as the subject of criminal actions, unless character is itself an issue in the case. This has been held in an action to recover damages for a homicide (17), and a suit by an employer to recover from a clerk in his store funds mis-

(17) Morgan v. Barnhill, 118 Fed. 24.

appropriated while in his employ (18). On the other hand, in a civil suit where reputation is in issue, necessarily evidence of reputation is admissible. In slander and libel, the gist of the action is injury to a man's reputation by spoken or written words, as the case may be; and, in defense, it may be shown that the plaintiff had no reputation to lose. Thus, recovery may be absolutely defeated, or the damages may be greatly reduced. If the charge is that the defendant published that the plaintiff was a thief, and the defendant can show that he only published what most people thought, because the plaintiff had a general reputation for dishonesty, he has little to fear on the trial of the case.

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(18) Adams v. Elseffer, 132 Mich. 100.

CHAPTER III.

COMPETENCE OF EVIDENCE: HEARSAY.

§ 35. **The nature of competence.** In the last chapter we considered the subject of relevance, finding that in general evidence must relate rather closely to the issues of fact. We also noted that, oftentimes, matters which logically relate to the issues are inadmissible, because in some way they run counter to the judicial sense of what is safe and reliable, and violate the rules which have slowly crystallized under Anglo-Saxon jurisprudence to protect the jury from evidence most liable to error. Such matters are termed incompetent.

§ 36. **Hearsay evidence in general inadmissible.** Chief among matters held incompetent is hearsay evidence. Such evidence, as the term indicates, is evidence not given by a person as of his own knowledge, but repeated from some one else not before the court. A sues B for the price of a watch alleged to have been sold. B offers the testimony of C, who says that D told him that he had examined B's watch and found it defective. The evidence should be rejected because it is hearsay; C knows nothing about the watch himself; he merely repeats what he has been told. D is the person who knows and he should be produced.

§ 37. **Reasons for rejection of hearsay evidence.** The reasons for the exclusion of hearsay evidence are not far to seek. Testimony before the court is verified by the oath of the witness that he is speaking the truth; he is under the scrutiny of the opposing party and his counsel, and is subject to cross-examination. Such a witness may still err, but an innocent mistake is likely to be discovered in the full investigation of the trial, and searching questions often break down or disclose the wilful falsifier. At any rate, all reasonable precautions to obtain the truth are taken. With hearsay it is different. The real source of the evidence, the person who makes the original statement, is not before the court; he takes no oath; his testimony cannot be refuted or explained, or even investigated by cross-examination. Furthermore, we all know how any story grows in the telling. The testimony given in court will invariably be a little different from the statement as overheard, and it may be very different. For all these reasons, hearsay evidence is in general inadmissible, regardless of whether the statements repeated were written or printed. That is, a witness can no more testify to what he read about a given occurrence in a paper or letter, than to what he heard about it from the lips of somebody else.

§ 38. **Hearsay evidence sometimes admissible.** Hearsay is admissible in certain cases, either because there are circumstances tending to insure the truth of the evidence, which in the eye of the law make up for the lack of an oath and the opportunity for cross-examination, or, because, in the nature of the case, it is the best evidence obtainable. What these cases are we shall now consider.

Section 1. Confessions.

§ 39. **Voluntary confessions admissible.** A confession is strictly speaking hearsay evidence. It is a statement by one accused of a crime that he has committed the offense charged. Such a statement may be repeated in evidence by the person to whom it is made, provided it is given voluntarily and not induced by fear or favor. The ground of admitting confessions is that there is a strong probability that a person would not confess that he was guilty of a crime and incur the risk of a penalty, possibly imprisonment, or even death in a capital case, unless his confession were true. This probability does not hold, unless the confession is voluntary. In the old days of physical torture, a man might confess to almost anything to avoid present pain; and, even when the inducement to confess is immunity from punishment, or light punishment, an innocent man may confess to a fictitious crime, on account of the possible difficulty of proving his real innocence and the certainty of getting off easily by a pretended confession. Accordingly, it is only confessions which are induced neither by threats nor promises which will be received in evidence.

§ 40. **Same: Induced by fear or favor.** To render a confession invalid, the fear must be of the power by which the prisoner is held. It is no objection to a confession that it was induced by the solemn admonition of a priest to reveal the truth as the accused valued his soul, and that a worse punishment would follow hereafter, if, to the original crime, the prisoner added a false denial. Similarly, confessions are not impaired by the fact that they are made to procure the divine forgiveness. Such motives are not

deemed likely to lead to falsehood. It is earthly fear and favor in connection with the crime, that are to be avoided. On the other hand if such fear is inspired, regardless of the words used, it is fatal. Thus, a confession was rejected, although the prisoner was told only that it would be better for him to speak the truth, where it was apparent that the truth in the mind of the officer meant an admission of guilt, and the prisoner must have inferred that that was what was wanted (1). When, as in a recent Mississippi case, such an admonition was coupled with the fact that the prisoner had been confined for several days in a "sweat box," five or six feet by eight in size, and carefully blanketed to exclude all light and air, there would seem little doubt that the confession was worthless (2).

§ 41. **Evidence disclosed by forced confessions.** The real reason for excluding forced confessions is that there can be no confidence in their truth. The state may owe to criminals a duty of humanity and honesty, at least after their apprehension, but the ground of rejecting confessions secured by duress is not the violation of such a duty. Accordingly, although a confession which is obtained by fear or favor is itself inadmissible, yet if it gives a clue, or points to facts which can be proved by other evidence, they may be used, although they never would have been discovered without the confession. Thus, a woman who was charged with receiving stolen property was induced by promises of favor to confess. The confession was rejected, but evidence that the property had been found concealed

(1) Regina v. Garner, 1 Den. C. C. 329.
(2) Ammons v. Mississippi, 80 Miss. 592.

in her bed, where she had stated in her confession she had put it, was allowed (3). The reason was that the confession might have been influenced by the hope of favor, but the presence of the property in the prisoner's lodgings was evidence against her apart from the confession.

§ 42. **Confessions admissible though obtained by artifice.** Likewise, confessions are admissible, even where they are obtained by a trick upon the accused, provided there is nothing to impugn their truth. Thus, a confession has been allowed, where it was given in the course of a conversation between a prisoner in his cell and a girl implicated with him in the alleged murder of his wife, and the conversation was overheard by two officers secretly stationed nearby (4). Both the officers and the girl were permitted to testify against the accused. The confession was secured by stealth on the part of the officers and a betrayal of trust by the girl, but there was no motive to lead the prisoner to speak anything but the truth, and therefore the evidence was allowed.

§ 43. **The weight of confessions.** It thus appears that it is requisite to a valid confession that it should be given of the prisoner's own free will. Ideally, he should be informed in advance that he need not speak unless he wishes, and that if he does speak whatever he says may be used against him. In fact, although nearly all police officers are aware that confessions are invalid if they are obtained by intimidation, and accordingly open threats are avoided, still prisoners accused of crime are subjected to very great

(3) King v. Warickshall, Leach (4th ed.) 263.
(4) Commonwealth v. Goodwin, 186 Pa. 218.

pressure. They are under constant surveillance, they are confronted with the supposed objects and tools of their crime, and such of the evidence against them, as is deemed desirable, is rehearsed. The compulsion to confess may be as strong as under direct intimidation or promise of favor, which the law condemns. Yet, unless physical fear is inspired or punishment threatened, in the trying police examination following the arrest of the prisoner, the confession is admissible. There is this safeguard against abuse —that the strain to which the accused is subjected may be considered by the jury, on proper evidence, in determining the weight of the confession, and, if it appears that the confession was wrung from him against his will, by a course of conduct almost tantamount to persecution, it may be disregarded. It is still admissible, but the question of the weight to be given to it is for the jury.

Section 2. Admissions.

§ 44. **Admissions competent on same theory as confessions.** A confession is an acknowledgment by a person that he is guilty of the crime charged against him. In the nature of things, it applies only to criminal cases. We now pass to consider admissions, which differ from confessions in two important respects: first, they apply to all cases, civil as well as criminal; second, whereas, by the weight of authority, a confession is an acknowledgment of all the material elements of the crime charged, requiring no inference or further facts for a finding of guilt, if it is believed, an admission may be a statement of only one or more facts against the interest of the speaker, which fall short of completeness; they may be explained or overcome. For in-

stance, A is charged with the murder of B and says: "I killed him on purpose because he discharged me." That is a confession, because it is an acknowledgment of the entire crime, which, if believed, compels a verdict of guilty. But if A merely says, "I saw him die," that is an admission only, because, while it connects the prisoner with the victim's death, it is open to explanation such as that he was trying to help the dying person, or that he was present only by chance; and, even if unexplained, would fall far short of the evidence necessary for a conviction for murder. The same principle, however, which leads to the admission of confessions in evidence—that a person would not incriminate himself unless he spoke the truth, applies only in a less degree to many, probably most, admissions, and results in their admissibility on the theory that a person would not make a statement against his interest unless it were true. Since it is requisite only that admissions be opposed to the contention of the maker on the trial, and not necessarily contrary to his interest when uttered, the principle just stated does not apply in all cases. Generally, however, admissions are in the nature of concessions against interest when made. When they are not, they are allowed on the broad ground that whatever evidence a party makes against himself, whether consciously against his interest or not, is competent.

§ 45. **Same: Illustration.** Illustrations of such admissions will readily occur to any one: A sues B for the price of a car-load of steel, which he warranted to be first-class. B's defense is that the steel was defective. On this issue he may show A's statement in a conversation with C: "I

knew the steel I sent to B was poor, but I couldn't get any other at the time, and I had to fill the order." The evidence is hearsay, because C knows nothing about the steel; he only testifies to what A told him, but there is a strong presumption that A would never have said that the steel was poor, unless such was the case.

§ 46. **Admissions in evidence distinguished from those in pleadings or in court.** Admissions in evidence, which we are now discussing, should be distinguished from admissions in the pleadings, or solemn admissions by the parties themselves through their counsel in open court. Such admissions, as we pointed out in the first chapter (§§ 3-4), serve to narrow the disputed issues of fact on which evidence is necessary. The admissions now under discussion are admissions outside of the trial of the case, testified to by other persons than the parties making them, and tending to contradict the position taken by the parties in their pleadings.

§ 47. **Admissions by conduct.** We have just seen that such admissions may consist of spoken or written words of a party against his interest. They may also consist of conduct. A man is arrested for speeding his automobile. The policeman testifies that, just after he hailed the accused and before he could overhaul him on his motor bicycle, he saw the latter disconnect his speedometer. This act would certainly be allowed in evidence as an admission, unless explained, that the driver was traveling at a speed greater than he cared to have known. In an actual case of a suit against a railroad for injury to the plaintiff's wife, the defendant was allowed to show that the husband

asked a man, whom he knew did not see the accident, to testify in the wife's behalf, promising him part of the expected damages if he would do so (5). The theory was that the plaintiff's conduct in working up false testimony was an indication that he had no good cause of action.

§ 48. **Admissions by silence.** Not only conduct, but the silence of a party when he would naturally be expected to speak, may be evidence against him. A, who is a member of the legislature, is charged by B, in the presence of C, with accepting a bribe for his vote on a certain bill. If he does not deny the accusation, but stands mute, his silence would probably be evidence against him, and C could testify to it, because, from our acquaintance with human nature, we know it is not the habit of men falsely accused to stand tamely by without resentment. On the other hand, if the charge was merely published in a paper, A's failure to reply would not be admissible in evidence, because many things are published in the papers which are not true, and newspaper charges are often regarded as too irresponsible to call for notice. Of course, if the silence of a party is to prejudice him, he must be in his right senses. Thus, when a person is rendered hysterical by an injury, no inferences can be indulged because she does not contradict damaging statements as to the cause of the accident made by her companion (6).

§ 49. **Admissions in testimony in other cases.** Sometimes admissions in court in other cases, involving the same general subject matter, are admissible against the persons

(5) Moriarty v. London Railway Company, L. R. 5 Q. B. 314.
(6) McCord v. Seattle Electric Co., 46 Wash. 145.

making them. Thus, where the plaintiff sued for damages sustained in a collision, which he alleged was due to the excessive speed of the defendant's automobile, he was allowed to show that, in an action in a justice court for damages done to his buggy in the same collision, the defendant stated that he considered himself responsible. His former testimony was an admission, tending to contradict his testimony in the personal injury suit that he had not been guilty of negligence (7).

§ 50. **First-hand knowledge not a requisite of admissions.** So strong is the presumption of truth, in the case of admissions against interest, that it does not matter that they are made by a person who does not himself have first-hand knowledge of the things whereof he speaks, but depends on information from others. For instance, in a suit for damages due to negligence, the plaintiff put in evidence testimony by the defendant at the coroner's inquest, although he was not present at the accident, that "for some reason or other, that day the 'dog' was not in position and that caused the accident." Outside of the defendant, nobody could testify what caused the accident unless he saw it, because otherwise his testimony would be hearsay. But the probability was so strong that the defendant would not admit that the accident was due to any defect in the machinery for which he was responsible, unless it were true, that his statement was allowed as evidence against him (8).

§ 51. **Admissions of agents.** The admissions thus far discussed have been almost without exception admissions

(7) Shinkle v. McCullough, 116 Ky. 960.

(8) Reed v. McCord, 18 N. Y. App. Div. 381.

of the parties themselves. The question now arises, how far are admissions evidence against other persons? Let us consider for instance the effect of admissions of an agent. The rule is the same whether the principal is a person, a partnership, or a corporation: the admissions may be put in evidence, if they are made within the scope of the agent's employment. What that means in detail can be fully understood only from the article on Agency (9), but a few cases may illustrate the general principle. Thus, admissions of an agent invested by a corporation with power to adjust claims are admissible against the corporation, if they were made by the agent while endeavoring, as was his duty, to adjust the claim in controversy (10). Likewise, declarations of the superintendent of a company when receiving ore, that it is satisfactory, are admissible against the company in any subsequent suit involving the quality of the ore (11).

§ 52. **Same: Scope of rule.** Moreover, the rule, that admissions of an agent are admissible against the principal, sometimes applies to statements and acts by agents which, in themselves, are not a part of their duty and may even be opposed to it, but which are made while the agents are in the general performance of duty and relate to the same subject matter. Thus, in an action against a street railway company, evidence that the company's agent, who was employed to investigate claims for accidents and interview witnesses, had attempted to bribe a witness in the pending case, was allowed against the company without any proof

(9) See Agency, §§ 129-31, Volume I.

(10) Adams Ex. Co. v. Harris, 120 Ind. 73.

(11) Worthington v. Gwin, 119 Ala. 44.

of the agent's authority to give bribes (12). Presumably he had none; it might even be conceded that, if the company had known his corrupt methods, it would have disavowed them and discharged him instantly. Yet the bribe was offered in the course of performance of his duty to work up evidence in the case for the company, and indicated a lack of confidence in the legitimate evidence, the strength and weakness of which it was his business to know. On this theory, as a sign of weakness—not in the agent's evidence, for he personally was not interested, but in the company's evidence which he was trying, although wrongfully, to strengthen—it was admitted, just as evidence that a party to the suit had himself endeavored to bribe a witness was admitted in the English case already discussed (13).

§ 53. **Same: Limits of rule.** Admissions of an agent are allowed in evidence on the theory that, while he is doing his duty, he is to all intents and purposes identified with his employer, so that an admission by him applies to his employer with equal force. This rule probably approximates justice in most cases. It does not apply, however, to admissions or statements made after a given occurrence in controversy, which are disconnected from the performance of duty. Anything that agents may then say is entirely separate and apart from their business. Consequently such declarations are not admissible. A street-car superintendent, some time after a collision, stated that he should have known better than to place the motorman responsible

(12) Nowack v. Metropolitan St. R. Co., 166 N. Y. 433.
(13) Moriarty v. London Railway Company, L. R. 5 Q. B. 314.

for the accident in charge of the car. The evidence, however, was not admitted (14); it was too late, and outside the scope of the agent's employment.

§ 54. Admissions of predecessors in title. Admissions, as we have seen, are evidence against the makers and also against principals, if made by agents within the scope of their employment. They are also as a rule admissible against successors in title. In a suit for trespass to land, where the plaintiff's title was in question, the court allowed the son of a former supposed proprietor to state that he had heard his father say that he never claimed to own the land but had only a right of pasture in it (15). The theory in such cases is that the later proprietor stands in the shoes of the earlier and can have no greater interest; that, therefore, admissions of the former, made while he had an interest in the land and might be presumed not to admit a flaw in the title unless one existed, may be proved against the latter.

It has been held by courts entitled to great respect that the rule just stated does not apply to commercial paper, even after maturity (16), and other forms of personal property; but it is believed that the general rule now in the United States, in the case of personal property as well as land, is that admissions made by a holder of property while in possession, in regard to his title, are admissible against his successors. Statements made after his interest ceases are ruled out (17), because they are no longer admissions

(14) Fort Wayne Traction Co. v. Crosbie, 169 Ind. 281.
(15) Woolway v. Rose, 1 A. & E. 114.
(16) Paige v. Cagwin, 7 Hill (N. Y.), 361.
(17) Sears v. Moore, 171 Mass. 514.

against interest. Moreover, admissions by the holder of commercial paper, such as a note or draft, might not be admissible against a subsequent holder acquiring it by indorsement before maturity, because, as is explained in the article on Negotiable Instruments in Volume VII of this work, many defenses available against the original payee of a bill or note are not available against a subsequent holder, who acquires the paper for a consideration, by indorsement in the usual course without notice of such defenses.

§ 55. **Admissions of joint conspirators.** Admissions of a person accused of crime are available against his associate, provided the two are engaged in a joint criminal undertaking. There is the same improbability that we have noticed before, that the first person would give evidence against himself unless it were true, and, each being the agent and partner of the other in the illegal scheme, the evidence is admissible against both. Thus, two prize-fighters, although probably nothing was farther from their thoughts than cooperation and the main desire of each was to "knock the other out," were held joint conspirators in that both were planning to participate in a prize-fight against the laws of the state of Ohio, and a letter of one of the fighters written while in training, stating when and where the fight would take place and requesting the presence of his friends, was held admissible against his opponent as well as himself in a criminal prosecution (18)

(18) Seville v. State, 49 Ohio St. 117.

SECTION 3. DECLARATIONS AGAINST INTEREST.

§ 56. **Entries and declarations against interest.** Entries and declarations against interest differ from admissions, in that the former are made by other persons than the parties to the suit, or their agents or representatives. One of the commonest examples of a declaration against interest is an account book showing the receipt of money. Let us suppose a doctor's account on which appears an item of five dollars, received for a visit on March 1st, 1909, to A ill with bronchitis. Three months later A signs an application for a life insurance policy, stating that he has not been treated by a physician within a year. He obtains the policy and three months later he dies. Meanwhile the doctor has died. When A's beneficiary sues on the life insurance policy, the company objects that there was a false statement in the application. To prove it, it is allowed to put in evidence the doctor's account book with the entry described. When the entry was made, the doctor had no idea it would ever affect an insurance policy on A's life, but it is against a man's interest to charge himself with the receipt of money; it prevents him from demanding it again. Accordingly, the receipt is presumed to be true, although it is only hearsay evidence that the doctor received the money, and, being pertinent to A's declaration that he had not employed a physician within a year, it is admissible.

§ 57. **Nature of entries against interest as evidence.** Unlike admissions, entries and declarations against interest are not admissible so long as the person making them can be reached as a witness, because then better evidence

is available. If the doctor were alive he could testify whether or not he had treated A within a year, and his direct statement under oath would be more satisfactory evidence than his account book. When, however, a witness is dead and he leaves writings, which are at once against his own interest and pertinent to the case in controversy, they are admitted as perhaps the best evidence available. Thus, in a suit against the executor and sureties on the bond of a deceased county treasurer, for moneys misappropriated during his term of office, the sureties set up the defense that most of the missing funds had been taken during a former term, and, in support of their contention, they were allowed to introduce in evidence statements of the deceased officer, made before giving the bond signed by the sureties, that he was then behind to the amount alleged (19). The dead treasurer could hardly have made such an incriminating statement unless it was true, and the fact that he did not then realize that it would some day have a bearing on a suit against his sureties and friends, only entitled it to additional weight. In fact, it is often a characteristic of entries and declarations against interest, which goes to increase their credibility, that, as to the purpose for which they are introduced in court, they are wholly undesigned and unconscious testimony.

Section 4. Entries in Course of Business.

§ 58. **Entries in course of business.** It is a general requirement of the law that witnesses have first-hand knowledge whereof they speak. But in the present era of multi-

(19) County of Mahaska v. Ingalls Ex'r, 16 Iowa, 81.

tudinous and complex business transactions this is not always possible. Suppose a large department store sues a customer for the balance due on an account extending over a year. All kinds of articles have been sold, ranging from toys to furs, and books to sporting goods. In strictness the store should introduce, in order to prove the account, persons who, combined, can remember the sale and delivery to the customer of each of the articles in controversy. But this is out of the question. Very possibly there is not a single clerk or driver in the company's employ, who could truthfully testify as of his own present recollection to the delivery of one of the articles. He makes too many sales or delivers too many packages to remember any. The only way he can tell about a package, afterwards, is to consult his records, and the company has no better information than its servants. Thus, arises the importance of entries in the course of business, which may properly be treated in connection with hearsay evidence, because, as we shall see, they are admissible frequently in the absence of the person who made them; and, in any event, they are like hearsay evidence, in that they are evidence made outside of the trial in regard to matters of which even the maker has no independent personal recollection when the entries are produced in court.

§ 59. **Ground of admitting entries in course of business.** It is a general principle that such entries, kept in the ordinary routine of business, when identified either by the person who made them, or, in case he is unavailable, by other satisfactory evidence, which is often proof of the handwriting of the maker, are admissible. We have seen

that the theory underlying admissions as evidence is that a man will not state what is against his own interest, unless it is true. The basis for the admissibility of entries in the course of business is two-fold: the probability that the accounts of a man kept in the usual course of business, when he knows mistakes will bring trouble and make enemies, will be correct; and second, the practical difficulty, amounting often to impossibility, of getting any other kind of evidence.

§ 60. **Entries admissible even though made by party to suit.** Modern business men will feel that the first element, that is, the good policy of correct accounts, is very important. No one can stay in trade long who deliberately cheats in his accounts, or habitually makes mistakes. The world is sharp enough to find him out and go elsewhere. As a consequence, the presumption that accounts kept in the regular course of business are correct, is strong. At an early date in England it was not regarded as strong enough to warrant the admission of such accounts, when kept by the party himself. If the account was kept by a servant or employee it might be admitted, but, if a man conducted his own business without a servant, he could not use his book entries, because it was argued that would be to allow him to make evidence for himself. It may be imagined that such a rule found little favor in the new world, where, in the early days, there were many independent trades people who managed their business themselves. Such a case arose in New York, where a butcher sued one of his customers for the price of meat furnished. The butcher had no clerk and he kept his own books of account, but, on introducing

the testimony of other customers that they had dealt with him on the basis of his books and found them to be just, he was allowed to put them in evidence (20). This seems a rational decision; a man who would falsify his books would be pretty likely to require his servants to do the same thing, and business men in general are not likely to falsify their books, for the simple reason already stated, that in the long run it is bad policy.

§ 61. **Requisites of entries in the course of business.** At any rate, it is universally true in the United States that, whether a man keeps his own accounts or employs somebody else to keep them, he can introduce them in evidence, provided they are his regular accounts kept in the ordinary course of business, contemporaneously with the transactions to which they relate. The business character of entries offered in evidence is important, because, in so far as entries lose their regular business character and point toward the case in controversy, or in so far as they are made after the dispute arises, there is ground for suspicion that the maker is thinking more of his particular law-suit than of correct business methods. Thus, when a plaintiff produced a book containing debits against one person only he was not allowed to use it (21); there was too strong a chance that such a book, relating to the defendant only, might not have been kept in the ordinary course of business, but might have been prepared in expectation of the suit for the express purpose of proving the plaintiff's case. When entries against one customer are mingled

(20) Vosburgh v. Thayer, 12 Johns. 461.
(21) Re Fulton's Estate, 178 Pa. 78.

with entries against others, and when, moreover, they are made contemporaneously with the transactions involved, before a dispute is contemplated, the likelihood of falsification is slight and such entries are admissible.

§ 62. **Matters provable by entries in course of business.** The matters which may be proved in this way are numerous indeed. An employee of a bank can testify, from the records which he is required to keep as a part of his duty, that on a given date he made a demand for payment of a promissory note, although he has no distinct personal recollection of it (22). Another bank, by reference to the original entries made by its clerks, can show the state of a depositor's account and money deposited by him on a specified date (23). On the other hand, account books are usually not admissible to show money loaned (24), because the ordinary evidence of a loan is a note signed by the party bound. In other words, book entries which are made by one party only, apart from the other, are not favored, when unequivocal evidence of the obligation is or should be available. As a matter of course, ordinary mercantile accounts, wholesale and retail, from small grocery bills to importers' invoices aggregating thousands of dollars, can be established by book entries. One of the most complex situations arises when a stock of goods is burned and it is necessary to adjust the insurance. How shall the amount and value of the stock be fixed? The volume of goods varies from day to day, in consequence of sales and purchases, and the problem seems almost insoluble. Yet it

(22) Shove v. Wiley, 18 Pick. (Mass.) 558.
(23) Culver v. Marks, 122 Ind. 554.
(24) Smith v. Rentz, 131 N. Y. 169.

has been worked out, by proving the last inventory previous to the fire, and original records of sales and purchases subsequent to the inventory, and adding to or subtracting from the figures of the inventory, accordingly as purchases or sales are in excess (25).

§ 63. **Authentication of entries in course of business.** It is a striking characteristic of entries in the course of business, which has already been noted, that they preserve the knowledge of transactions which have long since passed out of the memory of the persons concerned in them. They are themselves evidence, and evidence hardly susceptible of contradiction, because no one has the independent knowledge wherewith contradiction is possible. The only test is authenticity; are they what they purport to be? —not accounts contrived to prove a special case, but entries made in the ordinary course of business while controversy was still unsuspected. So important is this consideration of the general correctness of the accounts, apart from their special correctness with reference to the case at issue (which as we have seen it is often impossible to determine), that, in the beginning, it was considered necessary, as in the case of our New York butcher (§ 60, above), for the person offering them to adduce the testimony of disinterested witnesses that they had dealt with him on the basis of his accounts and found them correct. This last element of proof is now in practice often omitted, and entries are received on the testimony of the makers, or other satisfactory evidence that they are original entries made in the due course of business.

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(25) Levine v. Lancashire Insurance Company, 66 Minn. 138.

§ 64. Method of authentication when maker of entries unavailable. Whenever possible, entries offered in evidence should be identified and sworn to be correct by the maker, and the rule is enforced unless there is some good reason for dispensing with his testimony. The clearest case is the death of the maker; in that event, his records are everywhere allowed to be proved by other persons, or by proof of the handwriting of the maker. Scarcely less of an obstacle to producing the maker is his absence from the jurisdiction of the court, his serious illness or physical incapacity to attend court, or his disappearance. Under these circumstances, also, the entries can generally be authenticated by other evidence. There is still another case, not strictly of impossibility of producing the maker of the entries, but of very great inconvenience. That is the case of mercantile accounts consisting of entries made by a large number of persons, for instance, in the suit of a department store against its customer. Imagine the trial of the case, if the company were obliged to produce the throng of clerks who made the numerous sales and of drivers who made the deliveries, and imagine the demoralizing effect upon the business of the day or more, if all these employees were withdrawn from their regular duties to attend the trial. Scarcely any claim under those circumstances would be worth litigating. Fortunately, such expensive procedure is often avoided by action of the parties, who are able to agree upon a large number of the items and can reduce to a minimum the items of which strict proof is required. Where this is impossible, although the courts move slowly and are very reluctant to dispense with

the testimony of the maker of the entries on the mere ground of inconvenience, there are cases in which they have admitted entries without the oath of the makers, where the latter were numerous, the entries were authenticated and explained by superior employees who had had a general oversight of the work of making them, and full opportunity for investigation was given to the other side (26). The adoption of this practice by all courts seems greatly to be desired.

§ 65. **Only original entries admissible.** Regardless of the method of authentication, the original character of the entries cannot receive too much emphasis. They must be the first permanent record of the transaction. Mere memoranda need not be preserved, if they are only temporary and made to be transcribed in more enduring form, but the first permanent entries should be produced. A bill, though based on sale slips or taken from a day book, does not satisfy the test, because it is not an original, but a derived or secondary account; error may have intervened, and, moreover, while the first entry is usually a matter of routine and undesigned, the transfer especially to a separate account gives time for thought and wrongful manipulation to one who is so inclined. Therefore, the law requires the production of the first permanent entries on the theory that thereby disputes can be most easily avoided and adjusted, and fraud prevented. It has been held repeatedly that a party's ledger is not admissible in evidence, when the original entries of the items in controversy were made in a day book which is not produced (27). For this reason

(26) No. Pac. Ry. Co. v. Keyes, 91 Fed. 47.
(27) Estes v. Jackson, 21 Ky. Law Rep. 859.

business men cannot be too careful, whatever their method of book-keeping, to keep the original entries (aside from passing memoranda) of all their transactions. It does not matter that afterwards the items are transferred to other records, as from day-book to ledger, or purchase tickets to bills, because such records, however satisfactory they may be in a business sense, are not available in law. The proper place for the original entries is not the waste-basket, but a secure file where they can be preserved against a day of trouble.

Section 5. Sworn Statements Not Made at Trial.

§ 66. **Sworn statements made out of court.** It is the design of the law, as has been stated at the beginning of this chapter, that evidence shall be given by witnesses in open court where they can be cross-examined. This requirement could not always be enforced, however, without the sacrifice of much valuable evidence. For instance, although courts possess power to compel the attendance of witnesses, this power is limited to their own jurisdiction and does not extend to witnesses outside. A party bringing suit in New York or Chicago can summon into court witnesses in his own state, but court process will not reach distant witnesses who may perhaps hold the key to his case. Furthermore, a case sometimes is protracted through two or three trials, and a witness testifying at the first trial may be dead before the second, or too sick to attend court. To meet exigencies of this kind, provision is made for obtaining, under strict conditions, the testimony of witnesses who for various reasons such as those stated cannot appear

in court. The principal varieties of such evidence are depositions and testimony in former trials.

§ 67. **Depositions.** Depositions consist of testimony given and reported outside of court, under judicial sanction. They are regulated by statute, but in general they are allowed when a witness is outside the jurisdiction, or in prison, or unable to travel on account of illness or injury. Depositions may be taken on either written or oral interrogatories, which are nothing more nor less than questions. That is, an attorney for a party may, at the place where the suit is brought, prepare written questions to be forwarded to the place of residence of the witness, for the latter to answer; or, he may attend in person or by agent where the witness lives, and there interrogate him as he would in court. In either case, due notice must be given to the opposing party so that he can be represented. If the method of written interrogatories is adopted, cross-interrogatories may be submitted to the witness in behalf of the opposing party, and, in case of oral interrogatories, he may be represented by an attorney to cross-examine the witness. It is needless to say that, in either case, the proceedings must be presided over by a judge, justice of the peace, notary public, or somebody else authorized to administer oaths, so that the taking of the deposition may be attended with due judicial formality.

§ 68. **Character of depositions as evidence.** Testimony thus preserved by deposition, when it is later offered on the trial of the case, partakes somewhat of the nature of hearsay evidence. That is, it is a record of what the witness said at another time and place, but it is obvious that it is

safeguarded by the judicial oath and by cross-examination, although, except in the case of oral interrogatories, this is not so direct as in the case of cross-examination by opposing counsel in open court. The only substantial element of testimony in court, which it lacks, is that of confronting the witnesses by the court and jury and the parties to the suit. This may be a serious deficiency. More than one man, who could make false answers to written questions, would betray his dishonesty by confusion under the sharp scrutiny of a judge and jury, and the unremitting attack of a hostile lawyer. On the other hand, as has been seen, depositions are often the only method of securing needed testimony, so that they are allowed from necessity.

Not only are they permitted in cases actually pending, but, by statute, under the name of petitions to perpetuate testimony, depositions may be taken to preserve evidence in anticipation of possible law-suits in the future. By this means, facts in regard to boundary lines, local customs or usages affecting the title to land, marriage or pedigree, or almost any matters necessary to the security of property rights, can be perpetuated. Such depositions are generally taken in the same manner as depositions in existing cases. Of course, there being no case pending, there is no opposing party to be notified, but notice must be given to the persons interested in the subject matter.

§ 69. **Former testimony.** As has been intimated, testimony given on a former trial is admissible in a subsequent trial of the same issues, if the witness has died in the meantime. Likewise, in civil suits, it is everywhere admissible

in case of his insanity (28), removal from the jurisdiction (29), or unavailability on any ground recognized by the law. Moreover, the argument for the admission of former testimony is stronger than that in favor of depositions, because, in addition to the elements of the judicial oath and cross-examination, the witness has already in the former trial been subjected to confrontation by the court and the parties to the suit.

§ 70. **Requisites of report of former testimony.** A stenographic transcript, properly authenticated, is the best evidence of former testimony, but it is not indispensable. A report of the substance of the testimony, by one who heard it given, answers all requirements, but the substance and not merely the effect must be given, for that might depend quite as much on the interpretation of the hearer as on the words of the witness. Thus, if the issue is whether or not there was an oral contract between A and B, D cannot testify that the purport of C's testimony at the first trial was that there was such a contract. He must state in substance what C said as to the conversation on the subject between A and B, because it is for the court and jury, and not for D, to determine whether the language of A and B, as reproduced by C, amounted to a contract.

§ 71. **Former testimony admissible against successors in interest.** Under the conditions stated, former testimony is admissible on a subsequent trial, not only between the same parties but also, where the issues are unchanged, between their successors in title, or privies as they are called;

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(28) King v. Inhabitants of Eriswell, 3 T. R. 707.

(29) Minneapolis Mill Company v. Minn. R. Co., 51 Minn. 304.

that is persons standing in their shoes. A law-suit may be begun between two men as to the title to certain land, and, after the first trial, both men may die, their interests descending to their sons. Of course the title of the sons to the land in controversy is precisely the same as that of their fathers before them, and therefore the testimony of a witness at the former trial would be admissible on a second trial between the respective sons. On the other hand, it has been held that where a case was brought to determine the title to property, and subsequently, on the death of one of the parties, his father, who had been supposed to be dead, appeared and occupied the land in dispute, testimony against the son in the first trial was not admissible against the father in the second, because, although the son might claim through his father, the father could not claim through the son and might stand on an entirely different basis (30), such, for instance, as a life estate in the father which would confer no rights on the son but would sustain the claims of the father himself. In other words, the rule of privity is strictly enforced in connection with the admissibility of former testimony against a new party, it being regarded as unfair that one man should be affected by testimony given against another, unless he stands exactly in the other's shoes.

§ 72. **Depositions and former testimony in criminal cases.** One of the fundamental provisions in the Constitution of the United States and those of the separate states gives to the accused, in all criminal prosecutions, the right to be confronted with the witnesses against him, or, as it

(30) Morgan v. Nicholl, L. R. 2 C. P. 117.

is sometimes expressed, to meet the witnesses face to face. This provision has been held, however, to refer to the so-called right of confrontation only as it was enjoyed at common law, subject to certain exceptions, such as the admissibility of hearsay evidence in the cases discussed in this chapter, including depositions. Therefore, the constitution is not a bar to the reception of depositions in criminal cases, and, wherever authorized by statute, depositions are allowed in such cases under the conditions governing depositions generally. Without statutory provision, there is no authority for their use, either for or against the prisoner. Clearly the requirement of confrontation is no barrier to the use of former testimony against an accused person. Where a witness has once been confronted by the prisoner on trial, the constitutional provision is satisfied; and, if the witness dies thereafter, his testimony against the prisoner at the first trial can be used on subsequent trials (31). As to whether former testimony is admissible, in the case of disqualification of the witness for other causes than death, such as insanity, severe illness, or absence from the jurisdiction, the practice varies in different states. In some the admissibility of such testimony is limited strictly to the case of death of the witness (32), while in others former testimony is admitted in criminal cases under practically the same circumstances which would warrant resort to it in civil cases (33).

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(31) U. S. v. Macomb, 5 McLean, 286.
(32) Commonwealth v. McKenna, 158 Mass. 207.
(33) Lowe v. State, 86 Ala. 47.

§ 73. **Affidavits.** Regardless of the death or disqualification of the witness, affidavits or sworn statements are sometimes admissible by statute to prove certain specified facts. The service of a demand for possession in an action to oust a tenant can, in Illinois, be shown by the affidavit of the person making the demand, and statutes frequently authorize the same kind of proof of mailing, or posting and publishing, notices in public proceedings, such as special assessment cases, where notice is required. The ground of admitting sworn statements of this kind, which plainly are hearsay to the extent that they are records of statements made by persons not before the court, often is that the affidavits deal only with matters of a routine nature as to which there is little need of cross-examination. Moreover, in the case of serving a demand for possession, the defendant can come into court and deny the fact of service, thereby compelling the opposing party to adduce evidence, so that there is little opportunity for injustice. The admissibility of affidavits is, however, strictly limited to the cases specified by the statutes of the various states.

Section 6. Declarations Concerning Pedigree.

§ 74. **Declarations as to pedigree.** Another exception to the rule against hearsay evidence consists of declarations as to pedigree. There are no facts of which we feel more certain than our parentage and the date of our birth. Yet the only information which we have on these points is what comes to us from others. In other words it is hearsay. From necessity, therefore, hearsay evidence is every-

where admitted to prove what are called genealogical facts, such as birth, marriage, death, legitimacy or illegitimacy, and relationship both by blood and marriage (34). Moreover, the rule is not limited to the bare facts enumerated, but includes the time and place of birth, marriage, and death, and other facts which are essential elements of the primary facts mentioned. In England such declarations are limited to cases in which so-called genealogical facts are in issue. The principal cases of this type are those involving the descent of land, where the question of heirship is all-important. In the United States this limitation generally does not prevail, and declarations are as a rule admissible on pedigree matters, irrespective of whether they are main issues in the case or only steps in the proof of other facts (35).

§ 75. **Same: From whom admissible?** The facts of pedigree can be proved, not by the declarations of anybody who may have an opinion, but only by statements of the person whose pedigree is in issue, members of the family, or, generally in the United States, by intimate associates of the family for a considerable period, such as a housekeeper long in its service, or a family physician for some time. The theory is that, in the family, facts of birth, marriage, and death, are accurately preserved by tradition, and that any statements made by the various members or intimates are therefore likely to be correct. It was questioned as late as 1871 whether declarations of a person were admissible on the question of his own legiti-

(34) Shields v. Boucher, 1 De G. & Sm. 40.
(35) North Brookfield v. Warren, 16 Gray (Mass.) 175.

macy, but this was decided in the affirmative (36). It was always held that statements by a blood member of the family were admissible as to the pedigree of any other member, and, early in the last century, the rule was extended to cover the husband of any member, presumably on the theory that he would ascertain the family history of his intended wife before marrying her. Now declarations are allowed from both husband and wife, and relatives by marriage as well as those of blood.

§ 76. **Pedigree of illegitimates.** Formerly declarations as to the pedigree of an illegitimate child were precluded, because the theory was that an illegitimate was the child of nobody and therefore could have no relatives. So it was held in England that a statement by a brother, that another brother had an illegitimate son, was not admissible (37). In the United States the harsh rule of the English common law has generally been changed by statute, so that an illegitimate child is an heir of its mother, and often may inherit from (that is in contemplation of law, is related to) its mother's family. Wherever that is the case declarations by its mother's relatives, as well as declarations of the mother, are competent on the question of its pedigree (38). Likewise it has been held, although the courts are not entirely in accord on this point, that declarations of the father are admissible to prove the illegitimacy or the paternity of an illegitimate child (39).

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(36) Hitchins v. Eardley, L. R. 2 P. & D. 248.
(37) Crispin v. Doglioni, 3 Sw. & Tr. 44.
(38) Northrop v. Hale, 76 Me. 306.
(39) Heaton's Estate, 135 Cal. 385.

§ 77. **Declarations must be free from bias.** Declarations as to pedigree are not, however, admissible from anybody, unless it appears that they were made at a time when there was no controversy which would be affected by the facts stated. Thus, if the right of A to certain lands should be attacked on the ground that he was not the son of B his reputed father, who had held the land before him, declarations by the brother of the supposed father, made after that time, to the effect that A was really the son of B would not be admissible, because the probability would be too strong that they would be shaped to advance A's interest in the suit, and the same thing would be true if the declarations were against him; the likelihood of bias and design would prevent their reception in evidence.

SECTION 7. CERTAIN MATTERS OF PUBLIC NOTORIETY.

§ 78. **Public matters.** In the same manner that declarations of pedigree are admitted in evidence of family matters, declarations of persons with knowledge may be received in evidence to establish matters of public interest, such as well known boundaries and customs. The ground of admissibility of such declarations is that the subject of inquiry may run back so far in time that it is impossible to secure first-hand evidence, and, also, that anything which survives the test of public discussion and crystallizes into tradition and public reputation, is likely to be correct; anything wrong would have been eliminated in the course of time. On some such theory, statements made out of court have been admitted to show that the public was accustomed to exercise a right of tillage in a certain com-

mon (40), and that the duty of repairing certain arches of a bridge devolved from of old upon the lords of certain manors (41). In England it was held that such declarations were not admissible to show the location of private boundaries or private rights; but private boundaries, as for instance of a large estate, may be as notorious as public boundaries, and where the matter is a subject of common reputation it would seem to be largely indifferent whether it was public or private. At any rate, in an important case in California, it was held that the declarations of a deceased surveyor were admissible to show the southern boundary of a private land grant, on which the city of Sacramento was in part situated (42). It is needless to say that, in any case, before statements of public reputation will be received in evidence, it must be shown that they proceed from a source which is conversant with reputation as to the matter in question. Evidence of tradition is doubtful enough at the best, and. unless care were exercised, the door might be opened to the veriest myths.

§ 79. **Reputation as to present matters.** Reputation is admissible as to certain present matters, as well as to matters of tradition. Thus marriage can be shown by reputation in the neighborhood (43). The members of a community have a strong interest in finding out whether persons living in their midst are married or not, and their conclusions are usually correct. It has been held also that

(40) Weeks v. Sparke, 1 M. & S. 679.
(41) Queen v. Bedfordshire, 4 E. & B. 535.
(42) Morton v. Folger, 15 Cal. 275.
(43) Badger v. Badger, 88 N. Y. 546.

the death of a person can be proved by reputation (44), also solvency or the reverse (45), and there are decisions to the effect that wealth can be so shown (46), although this would seem to be an extreme application of reputation evidence. Wealth in open forms, such as land and buildings, may be fairly gauged by the public, but wealth in securities, which is the modern type, is to a large extent a closed book. Unless we are to substitute conjecture for fact, reputation must be confined to matters which from their nature are public and notorious.

Section 8. Ancient Documents.

§ 80. Contents of ancient documents. The surveyor's declarations, in the California case just cited (note 42), were explanatory of a map of the southern part of the grant, which likewise was put in evidence after his death. This illustrates the principle that old documents are generally admissible, under certain conditions, as evidence of their contents. Thus, old licenses to fish in a river have been received as evidence of ownership of the fishery by the licensor, an ancestor of the plaintiff (47), and old leases have likewise been admitted to establish ownership in an ancestor who was the lessor (48). It is generally said that documents for this purpose must date back beyond living memory; they must be more than a generation old. Furthermore, they must be fair on their face, indicating that they are genuine, and, as an additional token

(44) Linghouse v. Keever, 49 Ill. 471.
(45) Niminger v. Knox, 8 Minn. 110.
(46) Knille v. McConnell, 30 N. Y. 285.
(47) Rogers et al. v. Allen, 1 Camp. 309.
(48) Clarkson v. Woodhouse et al. 3 Doug. 189.

of authenticity, they should be in what is termed a reasonable custody, that is a custody which is consistent with their survival from of old as authentic documents. Possession by the claimant under the document, or the family lawyer, or any one else whose custody of the instrument is not suspicious, meets the requirement. Under these safeguards it is not difficult to understand that ancient documents are competent evidence of such matters as ancient possession and control, in connection with which they are most often used.

Section 9. Public Documents.

§ 81. Public documents. Public records are admissible in evidence on somewhat the same theory as entries made in the course of business; namely, that they are kept in the regular course of duty and therefore are likely to be correct. The presumption of accuracy is even stronger than in the case of private entries, because public records are made with the knowledge that they will be exposed to public inspection, and trickery will therefore be dangerous. The records of courts, legislative bodies, and executive departments of government of whatever type, city, state, or national, come within the rule. Thus, among records which have been held admissible, are signal service reports to show the direction and velocity of the wind and the fall of snow on a certain date (49), records of the government land office (50), and even Confederate archives to show whether a steamboat had been captured or purchased from a citizen of the United States by the

(49) Evanston v. Gunn, 99 U. S. 660.

(50) Black v. C. B. & Q. R. R. Co., 237 Ill. 500.

Confederate government (51). Although the United States never recognized the Confederacy as legally established, yet it took account of the fact that for four years it maintained a civil organization and a system of records, and that the same presumption of correctness which obtains in public records generally applied likewise to the Confederate archives. It is, however, essential to the admissibility of records on this theory, that they have a public or quasi public character, and accordingly a church register of baptisms has been excluded, although the same factors for accuracy might seem to be present (52). The records in that case, when authenticated, were received in evidence as entries in the course of business.

Section 10. Dying Declarations.

§ 82. **Dying declarations.** As another exception to the rule against hearsay evidence, the law admits dying declarations. The theory is that statements made in the consciousness of approaching death, under the solemn influences of such a time, are likely to be true. Not all dying declarations, however, are admissible. On the contrary, they are limited practically to statements made by the wounded victim in cases of homicide, as to the circumstances of his injury. Occasionally they appear in prosecutions for procuring death by a criminal operation (53), but in general they are not received outside of trials for murder or manslaughter. They are not admissible in civil cases, or even in criminal cases except homicide. It

(51) Oakes v. U. S., 174 U. S. 778.
(52) Kennedy v. Doyle, 10 Allen (Mass.) 161.
(53) State v. Power, 24 Wash. 34.

usually happens that they are directed against the prisoner, but they are equally admissible when they are in his favor (54).

§ 83. **Expectation of immediate death essential.** It is essential to the admissibility of dying declarations that they be made on the verge of death, that the declarant realize his condition, and that death in fact follow. In construing this requirement the courts necessarily exercise common sense. If a man is on his death bed, it will readily be assumed that he understands his condition, and an express statement that he knows he is dying is not necessary. Thus, a woman whose dying declaration was offered in evidence, did not say that she expected to die but remarked to her sister, in the midst of suffering, that she had given up all hope and did not think she would ever be taken out of the room where she was lying until she was "packed out." Naturally the declaration was admitted (55). Nor is it necessary that death follow at once; that is, in the same hour or even the same day, provided that it occurs in consequence of the injury from which the person is suffering and no marked change in his condition intervenes. Thus, it has been held that such a declaration is admissible, although it was made five months (56) before death, and while this case may be extreme, intervals of several days are frequent (57).

Mere death, however, is not enough without the expectation of death. Thus, in Mississippi, a man who was

(54) Mattox v. U. S., 146 U. S. 140.
(55) State v. Power, note 53, above.
(56) State v. Craine, 120 N. C. 601.
(57) State v. Power, note 53, above.

wounded seemed convalescent and felt confident of recovery. As a precaution his lawyer had him prepare a statement in regard to his injury, which was left unsigned. Later the victim became worse, and, shortly before death, signed the statement which had previously been drafted. On the trial of his assailant, following his death, the court rejected the offered declaration on the ground that when it was made death was not expected. To be sure, when it was signed, the victim fully expected to die, but the court decided that this was not sufficient. Persons who are very ill incline to acquiesce in suggestions, rather than to make the effort required for independent judgment, and the tendency of having the statement already prepared would be for the wounded man to sign it more or less mechanically without bringing his real judgment to bear upon it at the time of signature. The offered declaration therefore was his living, rather than his dying statement, and was not admissible (58).

§ 84. **Effect of belief in a hereafter.** It has been intimated that the ground for the reception of dying declarations is the belief that the awe, inspired by the approach of death, will lead any normal person to speak the truth, and therefore may well take the place of an oath. The question arises whether this would be true in the case of a person who did not believe in the Deity, or a hereafter. Formerly in England such a person could not even testify during his life-time; since he did not believe in God, the words, "So help you God," by which he was adjured to speak the truth, would be meaningless. In the United

(58) Harper v. State, 79 Miss. 575.

States, where religious qualifications have been done away, such persons are generally competent to testify, and, wherever that is the case, their dying declarations are also admissible. In some states they are not allowed (59). In most states, however, dying declarations are received regardless of religious faith (60), on the probably more rational ground that death is a serious and sobering factor in any event. Even in such states evidence that the deceased was irreverent and careless of death, or an atheist, is held admissible as affecting the credibility of his dying statement (61).

Section 11. Res Gestae.

§ 85. Declarations forming part of transaction in issue. Heretofore we have regarded hearsay statements as bearing upon the truth of the matters stated, and we have found that in that aspect they are generally not admissible. Sometimes, however, the question is not whether given statements are true, but whether they were made. They are then, in the Latin phrase "res gestæ," or things done, and, in our homely English and derived expression, the *gist* of the action; consequently they are admissible. For instance, in a suit on an oral contract, whether or not a contract was made depends on what words were used. If the conversation between the interested parties occurred in the presence of a third person, he certainly could testify as to what he heard them say, because that would be the very point to be established. If the case were different,

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(59) Donnelly v. State, 26 N. J. L. 465.
(60) State v. Elliott, 45 Iowa, 486.
(61) State v. Elliott, note 60, above.

the conversation being an account of an injury sustained by one of the parties, the third person could not testify to what was said, because the story of the injured person would be unimportant except as evidence of the accident to which it related, and on that point it would be pure hearsay. When, however, the substance of the conversation is itself an issue, not only in the case of the contract just cited, but in an action for slander when it is necessary to determine whether or not slanderous words were used, and in other cases that will readily suggest themselves, testimony of a third person to the statements made, is admissible.

§ 86. **Exclamations and statements accompanying acts.** The circumstances covered by res gestæ have, moreover, a wider scope than has yet been indicated. They include spontaneous exclamations of pain, horror, anger, or other emotions accompanying acts. If I see a woman struck by an automobile, I may testify not only to seeing her fall but to hearing her frightened shriek, because her outcry is just as much a part of the event as is the blow struck by the machine; it is not hearsay evidence, but an element of the occurrence in controversy. Going a little farther, the courts have held that not merely exclamations, but also statements accompanying acts are admissible in evidence, under this head. Thus, in a suit against an insurance company on an accident policy, it became important to determine whether the insured person, one Mosley, who had fallen down stairs at night and died sometime thereafter, came to his end as a result of the accident or from natural causes. On this issue, both his wife and his son, who saw

him only a few minutes after the fall, were allowed to testify that he said he had fallen down stairs and hurt himself badly (62). Such a statement is a little different from an exclamation, because it calls for thought, and yet when it is made at the very time of the accident, and obviously under the influence of it, it is competent evidence, on the theory that the person concerned is merely responding to conditions which have acted upon him, and has had no opportunity to frame a false or designing statement.

§ 87. **Same: When made too late.** A very slight interval is, however, sufficient to change the conditions and compel the rejection of the testimony. Thus, where thirty minutes elapsed after an accident, a statement as to the circumstances of his injury by the victim, who meanwhile had been removed from the railroad track, where he was struck, to a sidewalk, was rejected (63). It was held by the court that the accident was complete, and the initial shock had passed off before the statement was made. The victim's position even had been changed and the chain of causation broken. On the facts, it would probably be difficult to harmonize this case with the one previous in which the declarations might seem almost equally too late. But, however difficult it may be to apply the principle in close cases, there can be little doubt as to what it is: that statements made as part and parcel of an occurrence in issue, are themselves admissible in evidence. They are unlike admissions, in that they may count in favor of the maker as well as against him and they differ from dying

(62) Insurance Company v. Mosley, 8 Wall. 397.

(63) Waldele v. New York Central R. R., 95 N. Y. 274.

declarations in that they are admissible in all cases, civil as well as criminal, and they are not dependent upon death or even the fear of death, for their character as evidence. The assurance of their truth rests in the utter lack of opportunity for premeditation or design, either of these elements being fatal to their admissibility.

Section 12. Statements of Condition or Intention.

§ 88. **Statements of physical condition.** Statements by a person, as to his condition or intention, are frequently admissible although made out of court. For instance, in a personal injury suit, persons who knew the plaintiff and talked with him after his accident can testify as to what he said about his health, whether or not he suffered pain, and whether he was feeble or strong. Accounts of the injury of a narrative nature, detailing how it happened, are not admissible because they are pure hearsay. But it is the theory of the law that what a man says descriptive of his physical condition is usually induced by his real sensations and is likely to be true. From our knowledge of the frauds often practiced in personal injury cases, some of us are inclined to be skeptical of this doctrine, but it nevertheless prevails. Perhaps it is a survival of former times when a party was not allowed to testify in his own behalf, and the only way that he had of showing in court that he suffered pain from an accident, was by the testimony of his friends that he had given evidence of it. The rule allowing the testimony persists and is firmly established, although the disqualification of parties to testify in their own behalf has long since been removed.

§ 89. **Same: Some stricter views.** In some jurisdictions, declarations as to pain and physical weakness are admissible only when made to a physician in the course of treatment, it being thought that the physician from his superior knowledge can detect fraud, and, furthermore, that statements made for the purpose of treatment are most likely to be true (64). Generally, however, expressions of present suffering are not so limited, but are admissible if made to a wife (65), or for that matter to anybody else. Frequently, a plaintiff in a personal injury case describes his symptoms to a physician solely for the purpose of enabling the latter to testify in his behalf, and, in such a case, it has sometimes been held that statements of pain by the person examined are inadmissible, because the motive is too strong for the party to manufacture evidence of pain in his own behalf (66). Even in such a case, however, the trend of practice is to admit the statements, and leave the question of their credibility to the jury.

§ 90. **Statements of mental condition.** Clearly a person's statements are admissible on the question of his mental condition; for instance, his sanity, or insanity, or intoxication. The query in the question of sanity is not whether the things stated by the person concerned were true, but whether they were such statements as marked a rational mind. Accordingly, what the statements were may be shown on the witness stand by anybody who has overheard them. The same principle holds on the question, whether or not a person's conversation, by its in-

(64) Williams v. Great Northern Ry. Co., 68 Minn. 55.
(65) Bennett v. Northern Pac. R. R. Co., 2 N. D. 112.
(66) Jones v. Portland, 88 Mich. 598.

coherence or hesitancy or foolishness, indicated that he was drunk.

§ 91. **Statements of intention.** When we pass from mental condition to purpose, we touch more dangerous ground, because design enters into purpose and the manifestation of it. A person very often intends to do one thing and deliberately, by his words, leads the world to believe that he means another. Yet, inasmuch as sometimes it is only by a man's statements that his intention can be discovered, they are usually admissible for that purpose. For instance, to sustain the plea of self-defense in a trial for murder, the accused often endeavors to show previous threats by the deceased, which, coupled with his acts on the occasion in question, put the defendant in fear of his own life and led him to kill. Any declarations by the victim of a purpose to injure the prisoner, provided they came to the prisoner's knowledge, are admissible on this theory (67). Likewise, in a suit to enforce an insurance policy on the life of a person believed to be murdered, the plaintiff's theory was that the deceased went on a journey, in the course of which the crime was committed, but the identification of his body was uncertain and it was a question whether he ever took the journey. In this situation the court admitted in evidence a letter, written shortly before, in which he stated his purpose to do so. In other words, the statements of the deceased were allowed as evidence of his intention, which was one link in the chain of circumstantial evidence necessary to prove his death (68).

(67) State v. Beckner, 194 Mo. 281.

(68) Mutual Life Insurance Co. v. Hillmon, 145 U. S. 285.

§ 92. **Same: In case of wills. Principle involved.** Statements of intention may be important in the case of wills. The contents of a will can ordinarily be proved only by the will itself, and not by what a testator may have said that he intended to put into it, or had put into it. But statements of intention may be admissible on other issues. For instance, alterations are sometimes found in wills, and there is a question whether they were made after the will was executed and witnessed, in which case they would be invalid, or whether they were made prior to the execution of the document, and accordingly should be enforced. On such an issue it has been held that statements of the testator before the will was drawn that he intended to dispose of his property, according to the provisions of the will as altered, were competent evidence (69). Similarly, if it is contended that the will is invalid on account of undue influence, statements of the testator's intention may be received to show the probability or improbability that the will as executed represented the testator's free will and purpose.

The principle to be gathered from these illustrations is that, whenever intention is an element in issue, the statements of the party concerned are admissible to show it. They are oftentimes the only evidence, and, although the deliberate concealment by the speaker of his real purpose is always a possibility, purpose and statement in the main correspond. At any rate, there is a strong enough likelihood of correspondence to warrant the admission of statements of intention in evidence.

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(69) Doe d. Shallcross v. Palmer, 16 Q. B. 747.

CHAPTER IV.

COMPETENCE OF EVIDENCE: WRITINGS.

Section 1. Original and Secondary Evidence.

§ 93. **Production of original writing.** One of the first rules of evidence in regard to writings is that their contents shall be proved by the production of the original document at the trial before the court and jury. This applies to writings of any kind which are in issue. The reason is clear: the original document comes closest to the parties affected. It is first-hand evidence and presumptively the most reliable. In the case of a contract, deed, lease, or other agreement, it is usually signed or purports to be signed by all the parties, so that any dispute as to the genuineness of the signatures can be most easily settled by reference to it. Moreover, documents are often interlined or altered and it is very desirable to have the original in case of dispute as to whether the alterations were made before the document was executed, so that they were properly a part of it; or afterwards, in which case they would have no effect. These points cannot be determined ordinarily from copies or verbal evidence, because, even in accurate copies, alterations are often not distinguished from the original parts of the document, and the original signatures are only copied and not reproduced. When,

to these advantages of the original document, there is added the possibility of error or deliberate misrepresentation in making copies, or still more in stating verbally the contents of the instrument in question, it is not strange that the law insists, as it does, upon the production of the original wherever possible.

§ 94. **"Best evidence" rule.** The literal idea of the so-called "best evidence" rule is that a party must prove his case by the best and most satisfactory evidence of which the circumstances will admit. This was once applied by a celebrated English judge, Lord Ellenborough, to the extent of forbidding a party to prove his case by circumstantial evidence, where there was a living witness to the facts, even though the witness was an agent of his adversary (1). We know now that such an application is incorrect; that in general a person may establish his case by any evidence which is relevant and competent, regardless of whether or not it is the strongest evidence. If he introduces only circumstantial evidence, when it is known that there is an eye witness to the occurrence in question whom he could call and does not, his omission, unless explained, may greatly weaken his case with the jury, but that goes to the weight of the evidence and not to its admissibility. Although, therefore, there is no "best evidence" rule of universal application, it exists in the case of writings to the extent of forbidding secondary evidence of their contents so long as the original is unaccounted for.

(1) Williams v. E. I. Co., 3 East, 192.

§ 95. Secondary evidence of writings sometimes admissible. From the necessity of the case, other evidence than the original document is allowed when the original is unavailable. Thus, in an early case, a copy was admitted in evidence when it appeared that the original had been burned (2). Similarly, copies are admissible in any case where the originals are lost or destroyed, without fault of the parties offering them. Persons have been allowed to prove the contents of drafts paid by them, which they had destroyed after they were returned from the bank (3). It would have been more prudent for them to keep the cancelled drafts, but they showed that they were in the habit of destroying all their drafts after payment and that they never suspected any dispute as to the drafts in question. On this showing secondary evidence was admitted, although, if there had been any indication that the originals had been destroyed for the purpose of avoiding their production in court, the decision must have been different.

When the door is opened to secondary evidence it may be of any kind available. A copy which has been compared with the original is the most convincing evidence in such a case, but there is no rule of law which requires it. Thus, a copy made from a copy and not from the original has been allowed (4), and, in default of a copy, verbal testimony as to the contents would be admitted from a person who had knowledge of the document. Naturally, in

(2) Medlicot v. Joyner, 2 Keble, 546.
(3) Steele v. Lord, 70 N. Y. 280.
(4) Goodrich v. Weston, 102 Mass. 362.

the case of a copy, it would be necessary to show, as preliminary to its introduction, that it was substantially like the original.

§ 96. **Service of notice to produce original.** When an original document is held by one party, and his opponent wishes to introduce it on the trial, the law requires him to serve notice for its production; then, if it is not forthcoming, secondary evidence may be offered of its contents just as if it had been destroyed. Such evidence is not admissible without service of notice, unless the document is actually brought into court by the adverse party. In that event no notice is necessary, because the only purpose of notice is to procure the production of the original rather than a copy, if it is to be had, and this purpose is attained (5). Moreover, in a suit on a contract consisting of written orders and letters between the parties, it has been held that secondary evidence of letters addressed to one of the parties could be offered by the other without notice, because the institution of the suit was in itself notice that the letters which constituted the contract would be in issue (6). This, however, would not be a safe precedent to follow. The only method of making sure of permission to introduce on the trial secondary evidence of documents in the hands of the opposite party is to serve him with notice in advance. This notice should be timely, but not necessarily longer than to enable him to make the necessary search for the document, and one day is usually considered sufficient.

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(5) Dwyer v. Collins, 7 Ex. 639.

(6) Zipp v. Colchester Rubber Co., 12 So. Dak. 218.

§ 97. **When original need not be accounted for.** Not only may the contents of a document always be shown by secondary evidence, when the original cannot be obtained, but there are cases when it is not necessary even to account for the original. When a writing is executed in duplicate, that is, two copies are signed and executed with the same formalities, there is no single original, but both documents are originals and either may be introduced as such without accounting for the other. Hence the wisdom, from a legal standpoint, of executing all important documents in duplicate, triplicate, or as many copies as there are parties involved. Moreover, it is not necessary to produce the original of a document which is only collateral to the issue. Thus, in a suit on a note, when payment was pleaded, the plaintiff averred that the money, which the defendant testified he had paid in discharge of the note, was paid on another note. To give this evidence the plaintiff was not obliged to introduce the other note because the issue was not as to the contents of the other note but as to whether the money, which it was admitted the defendant had paid, was paid on that note or the note in suit, and the production of the other note would not have helped in the solution of that question. Accordingly the verbal testimony of the plaintiff was allowed (7). Finally, the admission of a party to a suit, that a written document contains a given statement which is against his interest, may be shown without the production of the document in question, on the theory, applicable to admissions in general, that the per-

(7) Coonrod v. Madden, 126 Ind. 197.

son would not make such an admission unless it were true (8).

§ 98. **Evidence of public records.** As we have seen in another place (§ 81, above), public records, such as statutes, ordinances, and court records can ordinarily be proved by certified copies. The production of the original is not required, because it is inadvisable that such records should be withdrawn from the places provided for their safe-keeping where the public can have free access to them for examination. Copies therefore may be offered, on certificate of the proper officer that they are correct, without even his attendance in court. The question arises whether a deed which is recorded in a public recording office becomes thereby a public document, which can be proved by a certified copy without the production of the original. In many states there are statutes to that effect, but, otherwise, the weight of authority seems to be that, even in the case of a recorded deed, the original must be accounted for before secondary evidence will be received (9).

Section 2. Attesting Witnesses and Ancient Documents.

§ 99. **Proof of attested documents.** It was formerly more common than it is now to attach to contracts and other important documents the signatures of persons, aside from the interested parties, as attesting witnesses. In such a case, it was the rule of the English common law that the execution of the document could be proved in the first

(8) Slatterie v. Pooley, 6 M. & W. 664.

(9) Commonwealth v. Emery, 2 Gray (Mass.) 80.

instance only by such witnesses, and that resort could not be had even to the parties to the instrument, much less to other witnesses, until it was shown that the attesting witnesses were unavailable (10). The same rule became established in the United States (11). If, however, an attesting witness was dead, the execution of the document might be established by proof of his handwriting (12). The same thing was true in case of his absence from the jurisdiction, and, if the witness was out of the jurisdiction when he attested the document, his absence would be presumed to continue unless there was evidence to the contrary (13). It was sometimes held, although rather rarely, that, in the absence of the attesting witnesses, documents might be proved by the handwriting of the parties themselves, without first attempting to prove that of the witnesses (14). The strict common law rule was that the handwriting of the witnesses must be first investigated, if they were unavailable, and recourse could be had to the handwriting of the parties only as a last resort.

In England the entire requirement was abolished by statute in 1857, and the more sensible rule introduced that an attested instrument could be proved like any other document, without regard to the attesting witnesses, unless attestation was required by law (15), and a number of American states have followed this precedent. In such

(10) Abbot v. Plumbe, 1 Doug. 216.
(11) Brigham v. Palmer, 3 Allen (Mass.) 450.
(12) Adam v. Kers, 1 B. & P. 360.
(13) Valentine v. Piper, 22 Pick. (Mass.) 85.
(14) Newsom v. Luster, 13 Ill. 175.
(15) St. 17 & 18 Vict. 125, sec. 26.

states it is practically only wills (which are everywhere required to be attested, and which it is universally held must be proved by the attesting witnesses if they can be found) which require to be so authenticated. Except where it has been changed by statute, however, the rule of the common law still obtains.

§ 100. **Proof of execution of ancient documents.** Proof of execution is waived in the case of ancient documents. Such documents are admitted in evidence without proof of execution, on account of the difficulty in securing witnesses after the lapse of time, when the persons who saw the documents signed or even could identify the handwriting of the signers are probably dead. For this purpose, the courts regard documents as "ancient" somewhat earlier than when they are introduced to prove ancient possession (§ 80, above). Thus, a document thirty years old meets the test. Precisely as when it is used to establish ancient matters, it must come from a reasonable custody. Furthermore, such a document must be consistent with the known facts. If a deed, it must as a rule, although not invariably, be accompanied by some evidence of occupation or payment of taxes on the land in question, either by the grantee in the deed or by his successors in interest. Otherwise, there would be too great a likelihood that it was spurious, designed by some adventurer to acquire title by fraud. When, however, an old deed is produced from the custody of a person who might naturally be expected to hold it, and is confirmed by acts of ownership, it is admissible, although it cannot be proved by first-hand evidence to be a genuine document. The theory is that it would not have

survived so long and would not be supported by corroborating evidence, if it were not true. Not only deeds, but leases, franchises, and other documents of a similar nature have been admitted in evidence under the general category of ancient documents. They are much less important today than they were formerly, and they will become less important as time goes on, because, under the recording acts of the various states, deeds to land, in order to bar subsequent deeds from the original grantor to other persons, must be recorded. The strong tendency is, therefore, to put deeds on record as soon as possible, and any questions as to their execution or genuineness are likely to be raised and disposed of, long before they have time to become ancient documents.

Section 3. Parol Evidence Rule.

§ 101. The parol evidence rule. As we have seen, one of the first principles of evidence in regard to writings is that they shall be proved, as far as possible, by the production of the original instruments. Another cardinal principle is the so-called "parol evidence rule," the purport of which is that the contents of a written instrument cannot be altered by oral declarations, and that evidence tending to show such alterations will not be received or heard by the courts. The object of putting an agreement into writing is to make it certain, to prevent doubt or controversy in the future as to what it means. The human memory is fallible, and the impression of agreements made by word of mouth is dimmed by the passage of time so that a witness's recollection, especially where his interests are involved, is not reliable. On the other hand, a writ-

ing does not change and a transaction crystallized into a writing can be preserved in its original form through months and years. This, however, assumes that the document shall be regarded as the sole evidence of the transaction. If, notwithstanding its existence, the law permitted parties at a later date to testify in court that there were other points than those covered in the instrument, or that the instrument did not mean what it said, the whole object of certainty would be lost and controversies and litigation would be interminable. Therefore, evidence tending to show that a transaction which was reduced to writing was different from the written record of it, is rigidly excluded.

§ 102. **Evidence as to character of transaction.** As has been stated the law does not allow oral evidence tending to contradict the terms of a written agreement. This, however, does not forbid the introduction of evidence that what appears to be a contract was not signed as a contract, but was to be effective only upon the occurrence of some future condition. Thus, where a man signed a subscription for stock to the amount of a thousand dollars, he was allowed to show that the subscription was given to the agent of the corporation to be held until other subscriptions were secured, which would bring the aggregate amount subscribed up to ten thousand dollars, and was not to be binding except on the fulfillment of this condition. The court considered that the evidence did not contradict a written contract because, under the circumstances, the other subscriptions never having been secured, the contract sued on had not come into existence as a binding ob-

ligation and there was no contract to be contradicted (16).

Moreover one who indorses a note or check is allowed to testify that the indorsement was not for value received, but only for the accommodation of the person at whose request the indorsement was made, and as against such a person this is a good defense (17). Again, the evidence does not contradict the written indorsement, but shows the nature of it. Likewise, it has been held that a written transfer of stock can be shown to be a pledge and not a sale of the stock (18), and, by an exception to the parol evidence rule which is based on principles of equity, a conveyance of land can be shown to be a mortgage from which the owner can redeem, not an absolute sale (19); or a conveyance in trust for charitable uses, rather than a sale (20).

§ 103. **Oral declarations not admissible to add terms to a writing.** The rule that a written instrument cannot be contradicted by parol, that is oral declarations, seems simple. If a contract provides that A is to get a dollar a bushel for his wheat, he will not be heard to testify in court that he was promised a dollar and a quarter. But not only does the parol evidence rule forbid testimony which on its face contradicts a written instrument, but it forbids evidence of verbal statements which would add to the terms of such a document, if the document on its face is complete. Thus, a contract was executed in writing

(16) Gillman v. Gross, 97 Wis. 224.
(17) Dickinson v. Burke, 8 No. Dak. 118.
(18) Brick v. Brick, 98 U. S. 514.
(19) Gassert v. Bogk, 7 Mont. 585.
(20) Mannix v. Purcell, 46 Ohio St. 102.

for the sale of lumber at a given price, with no reference to a warranty of the quality. When the buyer was sued for the price, he contended that the quality was defective, but, although he won his case in the trial court, the judgment was reversed on appeal, because the court erred in allowing him to add a warranty to the terms of the written contract (21). If he had wished to protect himself on this point, he should have inserted a provision in the contract, but, after he signed it, he could not call upon the seller to do more than he promised in the written instrument, and, as a consequence, he could not introduce evidence of the seller's failure in that regard. This may illustrate the necessity of putting into a written contract, which purports to be complete, every point which the parties desire to have embodied in the agreement between them, and neither party should be persuaded to omit any provision which he wishes, under the delusion that anyway he can enforce it later if occasion arises.

§ 104. Merger of negotiations in executed contracts. A common misunderstanding arises when a contract is executed at the end of a series of preliminary negotiations. Many persons, sometimes of considerable business experience, have an idea that whatever has been discussed and agreed upon during the entire series of conferences becomes a part of their contract, whereas the law is, in such a case, that the preliminary negotiations are merged in the written contract, and that nothing is a part of the contract which is not expressed in the final writing. To illustrate: one person leased of another a certain building with the

(21) Thompson v. Libby, 34 Minn. 374.

use of the furniture, and the landlord promised before the lease was signed that he would make certain repairs and put in new furniture. After the execution of the lease he failed to fulfil his agreement. When, however, the tenant sued for the landlord's failure to install the additional furniture, he was met with the fatal objection that there was no mention of additional furniture in the executed lease (22). It is commonly the case with leases that they provide that the tenant has inspected the premises and found them in good order. Consequently, any verbal assurances of the landlord that he will make repairs are not binding upon him, and the tenant must either trust to the voluntary good faith of his landlord, or protect himself by a separate written contract for repairs, made through correspondence or otherwise, prior to signing the lease; or better, insist upon a provision for repairs being inserted in the lease.

§ 105. **Evidence of trade custom.** To the rule that a written contract cannot be altered by extrinsic evidence, there is this exception—that evidence is sometimes admissible to show a trade custom, which, by business usage, attaches to all contracts in the locality of the same nature, and which has the effect of creating rights and duties not appearing in the strict letter of the contract. Thus, where a marine bill of lading called for the payment of a certain rate of freight on goods carried from New Orleans to Liverpool, the consignee was allowed to show a trade custom for the allowance of three months discount on goods from certain ports including New Orleans, and the

(22) Angell v. Duke, 32 L. T. R. (N. S.) 320.
(23) Brown v. Byrne, 3 E. & B. 703.

freight was reduced accordingly (23). Similarly, in a suit on a note becoming due on a day of the month which fell on Sunday, local usage was admitted to show that in such a case the note was payable on the Saturday before (24). The theory of the courts, in such cases, is that, although the contract apparently is varied by parol evidence, it is not really varied, because, when it is made, it contains the unwritten rule of custom, both by implication and by the knowledge of both parties that it is present in all cases of the kind, without the necessity of express statement.

§ 106. **Custom must not be inconsistent with writing.** When, however, the terms sought to be proved by custom are explicitly or impliedly excluded by the express agreement of the parties, evidence of the custom is inadmissible. In an Illinois case, a contract was executed for the sale of corn, and by the contract the purchaser agreed to make certain advances of money from time to time before delivery. When the seller asked for the first advance, the buyer demanded that he give a note. The seller refused, and later, when the matter got into court, the buyer attempted to prove that it was customary in such cases to take a note from the seller for the amount advanced. The court, however, rejected the testimony, on the ground that it was clear from the contract that the advances were to be made on the credit of the corn to be delivered, and that to admit evidence of a custom that the additional security of notes should be given, would be to change the apparent purpose of the parties as indicated by the instrument itself (25). In another case, where a coal com-

(24) Kilgore v. Bulkley, 14 Conn. 362.
(25) Gilbert v. McGinnis, 114 Ill. 28.

pany agreed to supply a city with what coal it might require between given dates, the court rejected evidence of a custom to the effect that all such contracts were subject to strikes, on the ground that the evidence was repugnant to the unconditional agreement to supply the city with what coal it might require (26).

The cases cited will indicate the uncertainty of the courts as to how far evidence of custom is admissible in connection with written contracts. The consensus of authority seems to be that such evidence is admissible to modify the force of written contracts to a certain extent, as yet vaguely defined. On the other hand, evidence of custom is inadmissible if it would work any radical change in the contract as drawn. Practically, the consideration of what the court regards as reasonable in each particular case is of very great weight.

§ 107. Oral declarations admissible as to collateral matters. While oral declarations are, as we have seen, ordinarily powerless to change the terms of a contract, such declarations may be received as to points which are collateral. Thus, according to a Massachusetts case, a person buying a lot of land may show that the seller made a verbal promise that he would grade and build the street, on which the lot was situated, to connect with a public street already opened, and would cause city water to be put into the street by a given time (27). The court held that the undertaking, here established by evidence of verbal statements, did not vary the contract for the pur-

(26) Covington v. Kanawha Coal & Coke Company, 28 Ky. L. Rep. 636.

(27) Durkin v. Cobleigh, 156 Mass. 108.

chase of the lot, but was, in the language of the cases, "collateral to it." The term "collateral," however, is an uncertain test, and the case cited is of doubtful correctness. An agreement by a landlord to repair an apartment might be regarded as collateral to his agreement to lease the apartment. Yet, from another standpoint, the first agreement varies the second and makes it, instead of an agreement to lease the apartment as it stands, an agreement to lease it in an improved condition, which will call for outlay on the part of the landlord and thus materially reduce his profit. The fact is that, when the verbal undertaking imposes upon a party to a written contract an additional duty in reference to the same subject matter and increases his burden, it is ordinarily inadmissible.

§ 108. **Oral declarations admissible regarding contracts only partly written.** The preceding discussion relates only to cases in which the written instrument is complete in itself, and appears to embody an entire undertaking between the parties. If a contract is partly oral and partly written, and this is apparent from the writing, oral declarations are always admissible to establish the oral provisions. This is the case where a writing is a mere memorandum, such as "Bought of G. Pink a horse for the sum of £7, 2s, 6d." There the buyer of the horse was allowed to show that the seller had warranted it would work well and go quietly in harness, because it was improbable from the memorandum itself that it was intended as a complete statement of the contract (28). In another case, a furnace company installed certain fur-

(28) Allen v. Pink, 4 M. & W. 140.

naces, which were guaranteed to effect a twelve per cent saving in fuel, but the method by which the saving was to be computed was not fixed. Necessarily, therefore, the way was left open for oral statements on this point; the contract did not cover it (29).

§ 109. **Oral declarations in case of fraud or mistake.** Although evidence is inadmissible of alleged terms of a contract, which are not incorporated in the written contract, evidence of oral statements is always admissible to show that the contract was obtained by fraud. To illustrate: The seller of a horse gave a written warranty that it was sound and kind. Orally he stated, in answer to the fears of the buyer that it could not make the speed required, that he would guarantee that it would cover seven or eight miles an hour, and he reiterated this as an inducement to the purchase of the horse. After the sale it turned out that the horse was slow, and the buyer brought suit for damages for false representations. On this issue he was allowed to introduce evidence of the seller's statement in regard to the horse's speed, not to vary the contract but to show fraudulent misrepresentations in securing it (30).

§ 109a. **Reformation of written instruments for mistake.** Moreover, in a proper judicial proceeding to reform (that is, to change the language of) a contract, evidence is admissible that in the original language there was a mutual mistake. Such mistakes often occur in the description of land in deeds. In one case, the buyer and

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(29) Hawley Down-Draft Furnace Co. v. Hooper, 90 Md. 390.
(30) State v. Cass, 52 N. J. Law, 77.

seller went upon the land in question, just before the deed was executed, noting particularly its boundaries, and then the seller gave a deed which he supposed described the land as they had observed it. In fact it turned out that the deed covered more land than the seller owned. Under the circumstances, in a proceeding in equity to reform the document according to the correct description, it was held that the mistake might be shown by evidence of the statements of the parties at the time the deed was executed (31). Such a decision seems an infringement of the parol evidence rule, because the effect of the evidence was certainly to change the terms of the writing. It did not, however, change the terms as the parties understood them when the deed was signed, and this was the saving point. The mistake was mutual. Only in such a case could the evidence have been admitted. Moreover, even then, such evidence is admissible only in a direct proceeding to alter the writing in conformity with the intent of the parties; the question of mistake cannot be raised as a defense to a suit at law for the enforcement of the deed or contract, but is confessedly an exception to the parol evidence rule allowed in equity (32).

§ 110. **No reformation in case of wills.** It has been held that the clearest mistakes cannot be corrected by evidence of oral declarations in the case of wills, and there reformation is unknown. An Irish testator devised all his real estate situated in the county of Limerick. At the time of his death he had no real estate in the county

(31) Goode v. Riley, 153 Mass. 585.

(32) See Equity Jurisdiction, §§ 104-5, in Vol. VI of this work.

of Limerick, although he had considerable holdings in the county of Clare, and it was reasonably certain that it was these he intended to devise. Nevertheless, it was held that the mistake could not be corrected by evidence of these facts (33). The special difference between wills and other documents is that, by the time mistakes are discovered in a will, the testator has died, and with his death the instrument is beyond the power to change. It can be annulled if invalid, but there can be no middle course; it must be rejected altogether or enforced as it stands, and any mistakes made are irrevocable.

§ 111. Oral declarations in regard to public records. It goes without saying that public records come within the scope of the parol evidence rule. The proceedings of every public body, such as a city council, a court, or a legislature, are recorded by the duly constituted officer. In the case of legislative bodies, the minutes prepared by the clerk are approved by the bodies themselves, either with or without reading; and, in any event, when the procedure fixed by law has been followed, the record is conclusive in the absence of fraud. If the minutes of a city council show a given course of action at a stated meeting, not even a member of the council can thereafter be heard to say in court that the record was incorrect. There is an element of public policy in this rule. The community has a right to look to its governmental records for information in regard to the public matters recorded, and to rely on it. This reliance would be impossible, if the rec-

(33) Miller v. Travers, 8 Bing. 244.

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ords were subject to be changed unofficially by word of mouth.

SECTION 4. EXTRINSIC EVIDENCE TO INTERPRET WRITINGS.

§ 112. **Oral declarations in the interpretation of writings.** It has been seen that oral declarations are not admissible for the purpose of contradicting or altering the terms of an instrument; but such evidence for the purpose of interpreting the instrument is a different matter. Some contracts are absolutely clear and unequivocal in themselves. In such cases there is no room for interpretation. But fully as many contracts must be taken in connection with the circumstances under which they were made and the purpose of the contracting parties, in order to be rightly understood. Such contracts do not tell the whole story; they are susceptible of one or more constructions, and, accordingly, extrinsic evidence is admissible to show the construction intended by the parties.

§ 113. **Customary meaning of terms.** A common instance of interpretation by outside evidence occurs in the case of technical or trade terms. An English jeweler by will left to his son "the sum of i.x.x." The sentence without explanation is meaningless, but the court allowed testimony to be offered that in the jeweler's trade "i.x.x" represented a hundred pounds and the doubt was removed. The evidence did not contradict the instrument; it simply showed what was meant (34). Again, we are familiar with the usage among plasterers, in estimating the number of square yards in a given job, to consider

(34) Kell v. Charmer, 23 Beav. 195.

not merely the actual area plastered but the entire wall area including windows and doors. Evidence of this custom has been allowed in the interpretation of the term "square yard" in a plastering contract (35).

§ 114. Construction of wills. Interesting and important questions of evidence constantly arise in the construction of wills. The fact which must be borne in mind in all such cases is that what the law recognizes is not necessarily the intention of the testator, but his intention as expressed in his will. Accordingly, evidence of intention as gathered from the conversation and even the letters of the testator is inadmissible, when it contradicts the will itself. It is for this reason that, if the will as written is ambiguous after all reasonable inferences are indulged, the testator's intention as ascertained from outside declarations cannot be annexed to the will to make it certain. That would be to change the character of the document from a doubtful instrument to one certain. On the other hand, when the will is not indicative of any lack of definite decision on the part of the testator but is merely susceptible of two or more constructions, outside evidence is admissible to show which was intended. This is not a case in which the testator seems to have been in doubt as viewed through his will; only we find it hard to understand him. As in the case of poor handwriting, the difficulty is not the testator's in expressing, but ours in reading his intention. Therefore, any evidence is admissible which will enable us to interpret and give effect to his real intention, not in opposition to his will, but in

(35) Walls v. Bailey, 49 N. Y. 464.

accordance with it rightly understood. These considerations will become clearer from illustration.

§ 115. **Wills sometimes not open to interpretation by extrinsic evidence.** There are numerous cases of wills so doubtful that they do not permit of interpretation by extrinsic evidence. Thus, a woman bequeathed all her real and personal estate to Elizabeth Travers and James Ulrich, and by another clause she gave all the remainder of her personal estate to her uncle's daughters, who were different persons. Clearly she had named two sets of persons to whom a portion of her personal estate should pass on her death, and her will, being inherently uncertain in this respect, other evidence of what she intended to do was not allowed; as to so much of her property the will failed (36). Another testator left four houses to four sons respectively, but in describing the houses he left the street number blank in each case, so that the will was uncertain as to which house should go to which son. This will also failed for uncertainty, and the property descended as if there had been no will (37).

§ 116. **Extrinsic evidence often received in aid of interpretation.** Cases in which the testator's intention has been discovered by the aid of extrinsic evidence are even more numerous. A testator left a certain sum to his daughter, to go on her death to her children by any husband whom she might marry except Mr. Thomas Fischer. When the will was probated, it was shown by evidence that Mr. Thomas Fischer was a married man with a fam-

(36) Ulrich v. Litchfield, 2 Atk. 372.
(37) Asten v. Asten, [1894] 3 Ch. 260.

ily, but he had a son, Henry Tom Fischer, who was courting the daughter during the testator's life and after the death of the latter married her. The will on its face seemed plain enough that children by Henry Tom Fischer were not meant to be barred, but the court held that the evidence that Thomas Fischer was already married raised a doubt as to whom the testator had in mind, that the description might almost as well refer to Henry Tom Fischer, and that evidence of the circumstances of the family showed that in the mind of the testator it certainly did refer to him. Accordingly the daughter's children by Henry Tom Fischer were barred from the bequest (38).

Likewise, an American testator bequeathed a portion of his estate to the American Tract Society. When the will came to be enforced it was shown in evidence that there were two societies by that name, one in New York and the other in Boston, and that both were organized for the distribution of the Bible. The case was held proper, therefore, for extrinsic evidence, which showed that the testator was acquainted with the New York society and that he must have intended that as the object of his bounty (39). But, in another case, where the testator left legacies to the Seaman's Aid Society of Boston, evidence that what the testator meant was the Seaman's Friend Society of New York and Boston, another organization for the same purpose, was rejected. This was not a case where the will designated a name which might apply to two or more societies. On the contrary, the description

(38) In re Wolverton Estates, 7 Ch. D. 197.

(39) Bodman v. American Tract Society, 9 Allen (Mass.) 447.

in the will was satisfied by only one organization, and, if the testator made a mistake in naming it, it was a mistake which was irremediable (40). Again the rule is illustrated that the only intention which can be shown, in construing a will, is intention consistent with the terms of the document and not intention which is opposed to it.

(40) Tucker v. Seaman's Aid Society, 7 Met. (Mass.) 188.

CHAPTER V.

COMPETENCE OF EVIDENCE: OTHER RULES.

Section 1. Opinion Evidence.

§ 117. **Opinion evidence ordinarily inadmissible.** It is an ancient theory of the law, which still prevails, that inferences are for the jury and that witnesses must confine themselves to facts. According to this conception, every case involves a mass of more or less definite data, and opinions to be formed on the basis of these data. The function of witnesses is only to furnish the former, and they are prohibited in general from entering the field of opinion. To illustrate: A, who has managed B's farm for a year, sues him for $500, which B refuses to pay, although he tenders $300. The arrangement between the two men, when A began his term of service, was embodied in a conversation in the presence of C. C, who is summoned as a witness, attempts to testify in B's behalf that it was agreed that A should receive only $300. He is, however, immediately checked, on the objection of A's counsel, because he is stating his opinion as to the effect of the words used by A and B, and this is the province of the jury. When he is instructed to relate simply what he heard, his testimony is to this effect: "B said, 'I'll give you your living and half of what you get for the crops.' A said, 'I won't work for less than $300 in addition to my

living.' B then remarked, 'All right,' and A went on the land and managed it for a year." The crops sold for $1,000 and A now demands his supposed share of $500.

Clearly there might be two opinions in regard to A's right to this sum. He himself would doubtless contend that he was to get half the price of the crops, but $300 in any event. B would assert that when A insisted on $300 anyway he waived all claim to the larger sum. It is for the jury to decide from all the circumstances which is the correct view. In other words, it is for them to form the opinion, and, if witness C were allowed to give his opinion instead of the actual language of the parties, the result might be very different, because his opinion or interpretation of the interview might be diametrically opposite to that which would be placed upon the same conversation by the jury.

§ 118. **Distinction between fact and opinion.** The general distinction between fact and opinion, for the purpose of evidence, is that a fact is something cognizable by the senses, such as sight or hearing, whereas opinion involves a mental operation. In the case just stated, the facts were the words of the parties, which C grasped through his sense of hearing without any conscious mental effort, whereas he could not form an opinion in regard to the contract growing out of the words used, without bringing his mind to bear. Ordinarily, as has been stated, when the facts, that is the words used or incidents observed, can be placed before the jury, and it is within the power of common men without special training—which the jurymen are supposed to be—to form an opinion, this func-

tion must be left to them and only facts are admissible from the witnesses. Actions for negligence are cases of this kind. Negligence is simply a failure to exercise that degree of care which ordinarily prudent men might be expected to exercise under the circumstances, and the jurymen are peculiarly qualified to interpret this standard, because they themselves are ordinary men. Accordingly, all expressions of opinion from witnesses as to whether given acts conform to the standard are rigidly excluded. The witnesses must state what was done; it is then for the jury to determine whether the defendant was negligent. Many a witness is either so sure that his opinion is right, or so anxious that the jury shall accept it, that if permitted he would state his conclusions in the broadest terms, never deigning to give the detailed facts—trivial they may seem to him—upon which his opinion is based. Yet such a witness is surely laying up trouble for himself. Not until he learns that he must state the facts, and hold opinions and conclusions in abeyance, will he be comfortable upon the witness stand.

§ 119. **Opinion admissible in matters otherwise difficult to describe.** Opinions may, however, be admissible, when, in the nature of the case, the facts on which they are based are too minute or intangible to be presented to a jury. Intoxication is a case in point. When we say that a man is intoxicated we are really giving our opinion, based upon what we see and hear, yet it would tax the powers of a novelist to state on the witness stand all the numerous details that pass through our minds in forming such a judgment: the lunging movements, the hanging head,

the incoherent talk. Practically, it is hardly possible to describe the condition of such a man better than to say that he is intoxicated, and such opinions are everywhere admitted. Opinions are likewise allowed, and for the same reason, in regard to sanity, speed, identity, and value. Thus, when an old man was attacked in his house by a robber, his daughter, who was in another room and did not see the assailant, but heard his voice, was permitted to testify that she recognized him and who he was (1). Otherwise, the only way in which the daughter could have shown the robber's identity would have been for her to describe his voice as she heard it that night, and the voice of the person whom she suspected him to be as it was at other times when she had seen him, leaving it for the jury to find whether the voice was in each case that of the same man. This the mere statement shows would have been impossible. Similarly, value is made up of many complex elements, much easier to sense than to declare; accordingly, opinions as to value are admitted from necessity.

§ 120. **Opinion evidence from unskilled witnesses.** Opinions as to the subjects mentioned in the previous subsection, and all subjects of a similar nature, can be given by unskilled persons, because they do not require special training. Some degree of familiarity with the particular subject under discussion must be shown; that is, a witness cannot testify as to the value of a piece of land, until he shows that he is acquainted with it and knows something about land values in the vicinity. Nor could he identify a

(1) Ogden v. People, 134 Ill. 599.

person, unless he knew him by sight. But, after all, the qualifications required of witnesses on matters as to which opinions are easily formed, are not high. Lack of qualification, unless it is absolute, usually goes more to the weight of the testimony than to its competence, and the testimony is admitted for what it is worth.

§ 121. Opinions in matters involving special skill or experience. Opinion evidence is admitted, not only where the facts upon which the conclusion is based are too minute and numerous to be presented to the jury, but also on questions which the jury are not competent to decide without assistance, on account of their difficulty. This is the field of skilled witnesses and expert testimony. Such witnesses cannot, any more than ordinary witnesses, invade the field of the jury by giving opinions on matters which the jury are competent to determine for themselves. No witness, for instance, would be allowed to state whether in his opinion boys liked to ride on a plank in the water (2), because only common sense and a slight acquaintance with boy nature are needed to answer such a question. Similarly the jury are competent to judge whether a platform consisting of two parts, one of which is nine inches higher than the other, is dangerous, and it has been held that such an issue is not a proper subject for opinion evidence (3). But, on such questions as the effect of a blow on the head upon a man's sanity, or the influence upon the durability of cement of an excessive amount of sand, the ordinary man on the jury is not com-

(2) Cooper v. Overton, 102 Tenn. 211.
(3) Graham v. Pennsylvania Co., 139 Pa. St. 149.

petent to pass, and accordingly the opinion of a physician or trained engineer, as the case may be, is allowed. Naturally, the qualifications demanded of an expert witness are higher than those of a lay witness. The expert witness must show training and practical experience in the field in which he sets himself up as an authority. Even here, however, it should be remarked that, if comparatively slight qualifications are shown (slight compared with the difficulty of the subject), the tendency of the courts is to allow the testimony, and leave it to the jury to discount it, if the witness's previous training seems insufficient or his conduct on the stand does not inspire confidence.

§ 122. **Opinion as to hand-writing: In England.** One of the most difficult problems in opinion evidence is that of the identification of hand-writing. Formerly in England ordinary witnesses and expert witnesses stood upon about the same footing in this connection; that is, if the question was whether the signature on a document, let us say a check, was the genuine signature of John Jones or was forged, both ordinary witnesses and experts could testify on the point if they had ever seen John Jones write, not necessarily the check in question but something, or if they had corresponded and received letters from him, or if in some other way they had become acquainted with his signature. Under this last head, probably the paying teller of a bank who never saw John Jones write and never received a letter from him, but who habitually cashed checks brought to his window by Mr. Jones, and thus came to know both the man and his sig-

nature, would be competent. Furthermore, the jury might compare the disputed writing with any other writing of John Jones which was relevant to the case and had been received in evidence. But testimony as to the genuineness of a writing, even from an expert witness, was held incompetent, if it was based only on a comparison of the disputed document with other specimens, even though they might be proved authentic (4). This rule was rightly regarded as arbitrary, and in 1854 it was changed by statute, so that now in England an expert witness may compare a disputed writing with any other writing which is shown to the court by satisfactory evidence to be genuine, and may testify as to his conclusions from the comparison (5).

§ 123. **Same: In the United States.** The rule in the United States is neither so hard and fast as the old rule in England, nor so liberal as the present English rule. It goes without saying that in the United States witnesses who have seen a person write (6), or received letters from him (7), or are otherwise acquainted with his signature, may give their opinion as to whether or not he wrote a disputed document. Furthermore, although the practice is controlled by the statutes of the various states, expert witnesses may as a rule compare the disputed document with any other document relevant to the issues and known to be genuine which is in evidence; but in many, perhaps a majority of the states, they still may not compare the

(4) Doe d. Mudd v. Suckermore, 5 A. & E. 703.
(5) St. 17 & 18 Vict. 125, sec. 127.
(6) Riggs v. Powell, 142 Ill. 453.
(7) Violet v. Rose, 39 Neb. 660.

writing in question with another writing, not related to the issues and produced for the sole purpose of comparison (8). In one or two states, notably Pennsylvania, the old English rule seems to prevail, under which comparisons by experts even with writing in evidence are not allowed (9), whereas in other states, such as Massachusetts, the modern English practice is sanctioned by the courts (10), and comparisons may be made with any specimens of handwriting shown to the court to be genuine.

§ 124. **Hypothetical questions.** Few features of modern trials seem more difficult to the lay mind than hypothetical questions. A hypothetical question, as the term indicates, is a question as to the result, if a given hypothesis or state of facts is assumed. It relates only to the examination of expert witnesses, being designed to elicit their opinion as to the consequences of certain facts, and to present this opinion as a guide for the jury in forming their own conclusions. The hypothetical question is unnecessary and improper where the jury are competent to form their own opinion, but it has a distinct place in questions of difficulty calling for special skill and experience which the jury lack. Thus, the hypothetical question is common in connection with medical testimony, and the testimony of engineers, or of any other experts. The requisites are not numerous, but they are imperative. In the first place the question must be based only upon facts which the evidence tends to prove, stated without comment or prejudice. Thus, if witnesses have testified

(8) Hickory v. U. S., 151 U. S. 303.
(9) Rockey's Estate, 155 Pa. St. 453.
(10) Costelo v. Crowell, 139 Mass. 588.

that the defendant, who pleads insanity, had a long illness of nervous prostration, after which he had become irritable and morose toward his friends, and that recently he had fallen into the habit of throwing his money into the river, an expert on mental diseases may be asked whether, assuming these facts, he would judge the prisoner to be insane. But he may not be asked whether, combining these facts with his own knowledge that the defendant's father died in an insane asylum and that one of his sisters was at that time confined in a sanitarium, he would pronounce the defendant insane, unless the latter facts also are in evidence. While, however, a hypothetical question must not assume facts outside of the evidence, it need not necessarily take into account all the testimony, but may be based upon any matters in evidence. Each party usually considers only his own evidence in framing his hypothetical questions, and relies on his ability to refute evidence offered by the other side to disprove his hypothesis. It then devolves upon the opposing lawyer, in the cross-examination of the expert, to marshal the evidence favorable to his client, and to interrogate the witness as to whether, on the basis of these other facts which had not been referred to in the direct examination, his answer would be the same.

§ 125. **Statement of facts in hypothetical questions.** While an expert witness may thus be asked for his opinion, on the basis of any facts which the evidence tends to prove, he cannot say, in a case in which the facts are disputed, although he has attended the trial from the beginning and carefully listened to all the evidence, whether

he would find the issues one way or the other (11), because that would be not merely to give the jury the benefit of his expert ability, but to usurp their function as judges of the facts, and probably to decide many other points than the technical questions which he was called to solve. That is, in every contested case, there must be many disputed questions of fact. In a petition, for instance, for the appointment of a guardian for a wealthy heir, on the ground of insanity, the petitioner may contend that the heir was violent and flighty in his youth, and may attempt to prove it by the testimony of his nurse and teacher. The other side may adduce evidence that these persons have been influenced by the petitioner, and that their testimony is the result of a plot. If the doctor who is called testifies that, assuming the facts as stated by the nurse and the teacher to be true, he is of the opinion that the person is insane, his testimony gives the jury the benefit of his expert skill, but leaves them free to discard it in case they do not believe the nurse and teacher. On the other hand, he cannot determine whether or not, on all the evidence produced at the trial, he believes the prisoner to be insane, without deciding for himself whether he credits or rejects the testimony of the suspected witnesses; and, unless his opinion is preceded by a question in which this point is made clear, the jury cannot tell on which basis he proceeded; accordingly they will not know how to deal with his testimony in case they decide one way or the other. This illustrates the reason for the rule that hypothetical questions should state with

(11) People v. McElvaine, 121 N. Y. 250.

certainty the elements upon which the witness's answer is to be based. Only in that way can the jury properly estimate the value of the testimony.

Section 2. Real Evidence.

§ **126. Nature of real evidence.** Real evidence is a term applied loosely to indicate almost any kind of evidence, except the testimony of witnesses or writings. Common instances of real evidence are the weapons with which crimes are committed, articles stolen, and, in general, all objects which are relevant to the case on trial. In actions for the price of wearing apparel, it is very customary to produce the garments before the court, if there is any dispute as to their quality or fit. Sometimes the defendant tries on his suit and exhibits it before the court and jury, in order that they may determine whether the tailor has done a workmanlike job. When objects themselves are of a kind that cannot be exhibited in court, such as buildings, photographs are often resorted to, and they are always regarded as admissible in evidence, if it is shown that they are a correct representation of the objects delineated (12). X-ray photographs have been held admissible in a proper case, such as an inquiry into the condition of the interior of the body (13). Even phonograph records have been allowed, on the question of the noise made in the operation of a railroad and the resulting damage to property in the vicinity (14). In cases brought for the condemnation of land or buildings,

(12) Livermore Foundry Co. v. Union Compress Co., 105 Tenn. 187.
(13) Geneva v. Burnett, 65 Neb. 464.
(14) Boyne City R. Co. v. Anderson, 146 Mich. 328.

it is almost the invariable practice to take the jury to view the premises, the property itself thus becoming evidence of its value. In other cases, such as suits for damages to land, personal injuries, or criminal prosecutions, either by agreement of the parties or the direction of the court, the jury are frequently taken to the scene of action. Some courts have taken the ground that this so-called "view of the premises" is not evidence in itself, except in condemnation cases, and that the only purpose of allowing it in other cases is to enable the jury to follow more intelligently the evidence given in court (15). It is questionable, however, whether this distinction is of any practical importance. The jurors would be hardly human, if, in reaching their verdict, they did not take into consideration whatever they had seen in the course of their "view," and, that being true, the "view" is to all intents and purposes evidence in every case.

§ 127. **Requisites of real evidence.** Real evidence can usually be introduced subject to the same conditions that would govern the introduction of verbal testimony. Primarily it must be relevant. We have seen that photographs are admissible, but this is true naturally only of photographs that throw some light on the issue. Thus, where there was a question as to whether there was a path across land at a given time, the court rejected evidence of a photograph taken two years later when the land had been fenced and the situation was thus changed (16). Furthermore, objects may be barred which

(15) Vane v. Evanston, 150 Ill. 616.
(16) Hampton v. Norfolk & W. R. Co., 120 N. C. 534.

seem designed rather to prejudice than to enlighten the jury. Thus, in a personal injury case, a plaintiff is ordinarily allowed to exhibit to the jury his injured member, because, from the inspection, the jury can determine to a certain extent the severity of the injury. But, in a suit by a husband to recover damages for an injury to his wife's foot, the court excluded photographs showing the injured member in aggravated aspects where the nature of the injury was very fully developed by other testimony (17).

Section 3. Evidence Incompetent on Account of Character or Circumstances of Parties.

§ 128. Parties as witnesses in their own behalf. It has been elsewhere stated that, under the English common law, a party was not allowed to testify in his own interest. The rule was obviously framed on the theory that such a party would be so biased that his testimony could not be believed. It broke down, however, before the fact that the testimony of the party himself was frequently the only testimony which could be secured, and that injustice was bound to result if it was excluded. Consequently, the rule has everywhere been changed by statute so that now a party is competent to testify for himself, the circumstance that he is a party being an element which may affect the weight of the testimony with the jury by showing bias, but which will not exclude it.

§ 129. Testimony to transactions with deceased persons. The one conspicuous exception to this practice occurs in

(17) Selleck v. Janesville, 104 Wis. 570.

suits in which one side represents the interest of persons deceased. Since the latter, in the nature of things, cannot testify, it is usually provided by statute that neither the parties themselves nor other persons directly interested shall be allowed to testify in suits to which the executors, administrators, or representatives of deceased persons are the opposing parties. Thus, the rights of the dead are protected and all parties stand on an equal basis. On the same principle, an adverse party cannot testify to conversations or transactions with a deceased partner or agent, unless they occurred in the presence of the surviving partner or principal. Moreover, in many states, the same rule obtains where the opposite party represents a lunatic or feeble minded person, as well as a person deceased.

This rule, framed for the protection of the deceased or incompetent person as the case may be, naturally may be waived by the person's representative. Thus, the statutes on this subject (and the whole matter is regulated by statute) usually provide that when there is testimony by any witness in behalf of the deceased, to conversations or admissions by the opposite party before the death of the deceased, the opposite party may testify as to such matters in his own behalf, and the same thing is true when depositions of the deceased person are read in evidence. The opposite party may then testify as to any matters covered by the deposition (18). The entire disqualification on account of the death of the opposite party has been removed in Massachusetts (19). In general, how-

(18) Hurd's R. S. (Ill.) 1908, 1058-1059.

(19) Mass. Statutes 1896, c. 445.

ever, it is a factor to be reckoned with, and an additional ground for reducing to writing all contracts and agreements of moment. They then do not depend upon the life of the parties for their admissibility in evidence.

§ 130. **Testimony of husband and wife.** There are certain human relations which the law regards as sacred and protects from publicity in the courts. Not only are the parties to such relations not obliged to disclose conversations between them, but such disclosures, though offered by one party, will be excluded out of regard for the other. Chief among these relations is that of husband and wife. The law regards it as essential that marriage should be marked by implicit trust, and that both husband and wife should be free to discuss the most vital matters without fear of injury. Consequently, though crimes may occasionally go unpunished and justice may sometimes fail, neither husband nor wife can give evidence of conversations with the other, nor in general testify either for or against the other. It might seem proper to allow testimony in favor of the spouse, but this is excluded (except where the rule has been changed by statute) as well as testimony against, possibly because one party, especially the wife, might be over-persuaded to support the other's case. In addition, the appearance of the parties on the witness stand in relation to each other's interests, possible inconsistencies in their testimony, and mutual doubts after the trial as to whether one had properly supported the other, might give rise to reproaches and disputes that would embitter the marriage relation. These reasons for excluding the testimony

of one spouse in favor of the other are perhaps far from convincing, and in a number of states in the United States the prohibition has been removed by statute, but in probably a larger number the common law rule still obtains, subject to limited statutory exceptions.

§ 131. **Same: Suits between spouses.** Naturally, in suits by one party against the other, such as actions for divorce, or personal injuries inflicted by one upon the other, or (in the case of the wife) for nonsupport, the case is different; the marriage relation is already ruptured and the testimony of the married parties, being necessary to determine the issues, is allowed. Aside from these direct actions between the parties, the testimony of husband and wife is often admitted in actions involving the separate property of the wife, or business transactions in which the wife acted as her husband's agent, and also in suits against carriers for the loss or destruction of personal property, especially baggage. The competence of testimony of husband and wife may be even further enlarged by statute, so that the laws of each state are the only safe guide on this point. But, as a rule, in all cases except in suits between the husband and wife, neither can testify to conversations with the other, and this protection extends even after the dissolution of the marriage bond by death or divorce.

§ 132. **Testimony of attorney and client.** The protection accorded to the relation of attorney and client is only less broad than that allowed to husband and wife. It is well settled that conversations between layman and lawyer, in which the lawyer is acting in a professional

capacity, are beyond the pale of judicial inquiry. This protection is accorded on the theory that the services of lawyers are often necessary for the protection of rights of persons and property, and that, therefore, everybody should be assured of safety in consulting a lawyer. It matters not that the lawyer does not represent his client in any case in court, or that he has not received compensation for his services; it is enough that he has been consulted in a professional capacity (20). Matters discovered by the lawyer outside of his professional relations, at a time when he did not represent his client, are competent, but all information obtained during the existence of the relation is barred. Probably the client's privilege would extend beyond death in any matter, the disclosure of which might injure him, but it has been held that in the determination of the sanity of a testator (21), or the construction of a will, it is proper to admit the testimony of the testator's lawyer as to the testator's mental capacity, the circumstances under which the will was drawn, and other matters which might throw light on the testator's intention (22).

§ 133. **Physicians and clergymen.** The relations of husband and wife, and attorney and client, just discussed, were protected by common law. The same protection is now by statute, in most states, extended to disclosures by a patient to a physician, the theory being that a person consulting a doctor for the alleviation of pain or the recovery of health, should not be subjected to the risk of

(20) Bruley v. Garvin, 105 Wis. 625.
(21) Layman's Will, 40 Minn. 371.
(22) Re Shapter, 35 Colo. 578.

injury or loss from such a course at the hands of the law. Accordingly, the judicial protection is granted to all statements made by a patient to a physician with a view to treatment, whether or not treatment is actually given. It may be that the services are originally rendered without the will of the patient, as where he is unconscious when attended. Nevertheless, nothing that the physician learns by examination at such a time can be testified to, except with the patient's consent. This has been held, even in the case of a man who attempted suicide and fought the efforts of the physician to succor him (23). There are decisions to the effect that the privilege of a patient extends after his death, so that the physician is incompetent to testify as to the patient's mental condition (24). On the contrary, however, it has been held that a physician is competent, after a patient's death, to testify as to whether the latter was in possession of the sound and disposing mind essential to the making of a will (25), and it is believed that this decision represents the better view. On the same theory that disclosures to a physician are protected, information obtained by clergymen in their professional capacity is now by statute barred from evidence in most jurisdictions.

On the other hand, communications between business men or friends, though expressly declared confidential, are not respected by the law. They are entirely competent in evidence, and the disclosure of such matters, when

(23) Meyer v. Supreme Lodge, 178 New York 63.
(24) Westover v. Aetna Life Ins. Co., 99 N. Y. 56.
(25) Winters v. Winters, 102 Iowa, 53.

they are relevant to the case, may be compelled by judicial process.

§ 134. **Proposals of compromise.** Proposals of parties to compromise disputes are protected, on the broad ground that it is good public policy to encourage the avoidance of litigation. Accordingly, it is inadmissible in any suit to introduce evidence that either party offered to compromise his claim. If such evidence were allowed to go to the jury, it would naturally give the impression that the party making the offer was in the wrong; otherwise, he would insist upon his original position. This inference, however, would be most unfair, because the party would probably be merely buying his peace. His offer would represent, not an admission that he was wrong, but his belief that it would be better to give something than to make a fight, probably tedious and costly, even granted that he deserved to win.

§ 135. **Facts stated in compromise negotiations.** While therefore, efforts to compromise are protected, facts stated in the course of the negotiations as true, regardless of the compromise, may be shown in evidence, unless they were communicated either expressly or by implication without prejudice. Thus, if a party, who is sued for damages of a thousand dollars for breach of contract, states at a conference with his opponent, "I will pay you two hundred dollars if you will dismiss the suit," that statement is inadmissible in court, because it is protected as an offer of compromise. But if, at the same conversation, although not as a part of the statement quoted, the same person says, "I sent a letter accepting the con-

tract; that is true," the second statement will be allowed in evidence as an admission against interest, because it is distinct from the offer of compromise and would hardly have been made if it were not true. On the other hand, if it had been accompanied by the words, "I say this without prejudice," or "You understand that this is not to be used against me," according to a number of decisions it would not have been admissible (26).

Notwithstanding these saving words, it is not advisable, under the law as it stands, for a party in compromise negotiations to disclose, even without prejudice, facts or circumstances which he would be unwilling to have used in evidence. The condition attached to his statements may easily be forgotten by an opponent who is unscrupulous, or one who is so biased that he can remember nothing but his own side, and the court, not being infallible, may take the word of the latter that the disclosures were made without reservation and admit them in evidence. Public policy might seem to require that, not merely the offer of compromise, but all facts and information given in the course of the conversation should be protected. Only under such a rule is frankness likely, and frank and open dealing is highly conducive, almost necessary, to the settlement of controversies. Nevertheless, in the majority of jurisdictions, this liberal rule does not prevail.

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(26) White v. Old Dominion Steamship Co., 102 N. Y. 660.

CHAPTER VI.

ATTENDANCE AND EXAMINATION OF WITNESSES.

Section 1. Attendance of Witnesses.

§ 136. Persons amenable to service as witnesses. All persons are amenable to the service of process to appear as witnesses. In the contemplation of law, a judicial inquiry should be as full and complete as the testimony of all persons having knowledge of the matters in controversy can make it, and therefore, no one, who has been duly summoned, is excused from appearing. However, one who has disobeyed a summons can show, as a defence to a proceeding to punish for contempt, that it was impossible for him to appear, or that, by reason of illness or otherwise, his life would have been endangered; but no business engagement is a valid excuse for such failure to attend.

In England, the sovereign alone is exempt from all judicial process, but in this country there is no exception to the rule of this section, not even in the case of the President of the United States, or the governors of the states. These officers are amenable to the service of process, the same as other citizens, and ought to obey subpoenas served upon them; but, if one of them should choose to disregard such a subpoena, his attendance and testimony cannot be compelled because the executive represents a

department of government coordinate with the judiciary (1). Another question, that of their privilege in not testifying concerning particular subjects, will be discussed below.

§ 137. **Privilege of witness in not answering particular questions.** Although every person is amenable to the service of process to appear and testify, a witness may be privileged with respect to certain testimony, or there may be certain matters concerning which he may claim the privilege of not testifying. For example, the President of the United States and the governors of the states, if called as witnesses, may refuse to testify concerning state secrets, the reason for this rule resting in public policy. And any person may refuse to give testimony which would tend to convict himself of a crime, or, as it is said, to incriminate himself. See Constitutional Law, §§ 114-17, in Volume XII of this work. But, in any case where the liability of a witness to prosecution has been removed, as, for example, where he has been previously tried and acquitted, or where the statute of limitations has run against his offence, he cannot refuse to testify on the ground that he might incriminate himself. And recent Federal statutes, granting immunity against prosecution to witnesses who should testify in certain cases, have furnished the "immunity baths" which have occupied public attention.

§ 138. **Same: Persons accused of crime.** In any criminal case, the accused may claim an absolute privilege not

(1) See 4 Wigmore Evidence, §§ 2369-71.

to testify at all. The clause in the Fifth Amendment to the United States Constitution, and in some of the state constitutions (1a) that "no person . . . shall be compelled in any criminal case to be a witness against himself," is declaratory of this principle. In order that the protection, which this rule is designed to afford to the accused, may not be robbed of its effectiveness, the prosecution is not allowed to comment to the jury on the failure or refusal of the accused to testify. But, if the accused voluntarily takes the stand and testifies in his own behalf, he may be cross-examined by the prosecution the same as any other witness.

§ 139. **Securing attendance of witnesses: Subpoena.** The ordinary method of securing the attendance of a witness in court, if he does not attend voluntarily, is by subpoena. A subpoena, as ordinarily used in the Illinois courts, for instance, is a writ issued by the clerk of the court, over his signature and the seal of the court, directed to the sheriff or other proper officer, commanding him that he summon the person named in the subpoena to appear before the court on the day and hour stated, to testify in the cause named. Such subpoena may be served upon the witness by the officer named, or one of his deputies, or by any other person, and should be obeyed by the person served, however it reaches him. It is common practice in the Illinois courts for the clerks to furnish to attorneys subpoenas signed and sealed in blank, leaving it to the latter to fill them in and to serve them in any manner that they may see fit.

(1a) Ill. Const. of 1870, Art. II, sec. 10.

A person may demand his witness fees at the time he is served with process to appear as a witness, in a civil suit, and it has been held that he is not obliged to attend unless his fees are tendered him in advance, but prudence would suggest that he be satisfied as to the law on this point in his jurisdiction, before refusing to attend in reliance on this fact, as failure to obey a subpoena, without proper excuse, is punishable as a contempt of court (2). In criminal cases, ordinarily, neither the state nor the accused needs to tender a witness his fees in advance (3).

§ 140. **Subpoena duces tecum.** The production of a document or writing which is in the hands of a third party may be secured by serving upon such party a *subpoena duces tecum;* which is a writ commanding him to appear in court as a witness on a certain day and hour, and to bring such document with him. Failure to obey such a subpoena is likewise punishable as a contempt of court. Documents in the hands of an adverse party to the suit may, likewise, be secured by subpoena duces tecum; or there may be served upon such party a simple notice to produce the documents, the effect of which is to admit secondary evidence of the contents of such documents, if the originals are not produced in compliance with the notice. It is not fair for a party to insist upon the best evidence rule (§§ 93-96, above) being enforced to exclude secondary evidence of the contents of the writing, if the original is in his possession and he refuses to produce it upon reasonable notice from the other side.

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(2) Chi. & A. R. Co. v. Dunning, 18 Ill. 494; 22 Ency. Pldg. & Prac. 1339.

(3) 22 Ency. Pldg. & Pr. 1340.

SECTION 2. GENERAL COURSE OF PRESENTING EVIDENCE.

§ 141. **Oath or affirmation of witnesses.** Every witness, before beginning his testimony, is sworn (or affirmed) to tell the truth; a form commonly used being an oath or affirmation to tell "the truth, the whole truth, and nothing but the truth." When the testimony is given through an interpreter, the latter is first sworn to translate correctly the questions and answers put to him.

§ 142. **Sequestration of witnesses.** It is within the discretion of the court, if it appears that the witnesses may fabricate their testimony in order to corroborate each other, to exclude from the court room all those not testifying, and to permit them to enter the court room and testify only one at a time. Such an order is made upon motion of counsel, and upon a proper showing that it is for the best interests of justice on both sides. It is called "putting the witnesses under the rule."

§ 143. **Order of presentation of case: Outline.** In any ordinary trial of a case, the usual procedure is as follows: first comes the plaintiff's direct case (or the prosecution's direct case, in a criminal trial), then the defense, and then the plaintiff's (or prosecution's) rebuttal. In some cases the defense is again heard on its sur-rebuttal.

§ 144. **Same: Plaintiff's direct case.** In making his direct case, the plaintiff ordinarily introduces all the evidence which he has to support the allegations in the pleadings upon which he relies for a recovery, and he must present at least enough evidence to make a prima facie case. By a prima facie case is meant such a showing that, if nothing further is presented by either side, the

plaintiff can recover—or such a showing as will impose a duty upon the defendant to introduce evidence on his side to meet the plaintiff's evidence. The reason for this rule is evident, when it is considered that the plaintiff, being the one who has brought the matter into court, ought to justify his conduct by showing that, in the absence of any contradictory evidence on the other side, he has enough evidence to support his allegations, or his side of the case. The plaintiff, therefore, introduces his evidence (which may be of any of the kinds of evidence hereinbefore discussed), and makes his direct case. If the evidence consists of the oral testimony of the plaintiff's witnesses, each witness is produced, sworn, examined in chief by the plaintiff's attorney, cross-examined by the defendant's attorney, and then re-examined by the plaintiff's attorney—the order in which the witnesses appear being determined by the plaintiff's counsel, usually according to his judgment as to the most logical order in which to present the facts to the court and the jury. Upon completing his direct case, the plaintiff *rests,* as it is technically termed. Before resting, the plaintiff should ordinarily introduce all the evidence which he has in support of his direct case, as it would disturb the orderly presentation of the trial to introduce some of it afterwards, and such a thing is usually allowed only by the grace of the court.

§ 145. **Same: Defense and subsequent proceedings.** The defense then presents its side of the case, introducing evidence in support of the allegations upon which it relies for a recovery, which evidence may likewise take any

of the various forms discussed above. If any part of it consists of the oral testimony of witnesses, these are produced, sworn, examined in chief by the *defendant,* cross-examined by the *plaintiff,* and re-examined by the defendant, it being noted that the party which is presenting its side of the case calls its witnesses and examines them in chief, and then turns them over to the other side for cross-examination. At this stage of the trial the defense calls all of its witnesses, and puts in all of its evidence, as, in the ordinary procedure, the defense is heard only once.

After the defense has introduced all of its evidence and rested, the plaintiff's side is again heard, on its rebuttal. The rebuttal bears about the same relation to the trial, as does the re-examination of a witness to his complete examination.

§ 146. Judge decides question of admissibility of evidence. It is the duty of the presiding judge to decide all questions relating to the admissibility of evidence, which may arise during the trial. The practice is for counsel to object to such evidence, when it is offered, as they may think improper, and the court then rules upon such objections. The party disfavored by any such ruling may ask to have his exception to such ruling noted in the record of the trial, in order that the ruling may afterwards be urged as ground for a new trial; or, in a reviewing court, as ground for a reversal of the judgment. Whenever the urging of an objection during the trial leads to extended argument by counsel, it is customary to send the jury from the court room, or for the judge and

the counsel to step into the judge's chambers, in order that the jury may not be prejudiced by the argument.

Section 3. Direct Examination.

§ 147. Direct examination or examination-in-chief. In the ordinary course of a trial in court, the testimony of the witnesses is given orally in the form of answers to questions put to them by counsel on both sides. The witness is first questioned, or *examined,* as it is called, by the counsel for the side which calls him; such examination being termed his *direct examination,* or *examination-in-chief.* He is then *cross-examined* by the adverse party, after which the party which called him is entitled to a *re-direct* examination. These various examinations will be further discussed below.

§ 148. Leading questions: Generally improper. On the examination in chief, the witness is asked a series of questions designed to elicit, by his answers, his knowledge of the facts in controversy; such questions must be so framed that the answers which they are designed to elicit will be admissible testimony, when viewed in the light of all the rules of admissibility hereinbefore considered, and, in addition, such questions must not be *leading,* as it is technically termed. A leading question is one which by its form suggests the answer which is desired. For example, if leading questions were allowed, the counsel for the defendant, in a personal injury case against a railroad company, might ask questions and receive answers from a witness, whom he knew to be favorable to the defense, somewhat as follows: "Wasn't the bell ringing?" "Yes." "Wasn't the whistle blowing?"

"Yes." "Didn't you see a flagman waving his flag?" "Yes." "The plaintiff wasn't looking when he drove on the tracks, was he?" "No." By such questions the witness would know in each case what answer was expected of him; and, even if he were inclined to tell the truth, if his memory were doubtful on any point he might quite likely be influenced to give an untrue answer by having it suggested to him. Also, a skilful lawyer, by asking a few leading questions designed to elicit answers which he knows to be true, might easily lead his witness to give his answers carelessly and without due consideration as to their truth or falsity, and might then trap him into making a false statement, notwithstanding the witness's determination to tell the truth. The questions should only direct the attention of the witness to the particular matter about which he is to testify, but should not suggest the answer.

§ 149. **Same: When allowed.** There are, however, a number of exceptions to this rule. At the beginning of a witness's testimony it is proper to direct his attention, by a few leading questions, to the matters concerning which he is expected to testify, such preliminary questions being allowed in order to save time. For example, a party called as a witness is usually asked: "You are the plaintiff (or defendant) in this case, are you not?" Or, he may be asked: "You are the same John Smith who testified yesterday, are you not?"

After a witness has apparently exhausted his recollection on a particular point, his memory may be stimulated by calling his attention directly to a matter concerning

which he is expected to testify, although under other circumstances this might be leading—as, for example, if the witness has testified to the substance of a conversation as fully as he appears able to, he may be asked: "Was anything said about this or that?" Or, after describing what he had seen, he might be asked: "Did you see this or that?" Such questions are allowed because of the necessity of the case, it being sometimes impossible, particularly in the case of a stupid witness, to procure from him all the facts within his knowledge without asking such questions.

Leading questions are also sometimes allowed when a witness is hostile to the side producing and examining him, as in such case he will often give evasive answers to the questions put to him, and will pretend not to understand what are the matters concerning which he is expected to testify. In such case a leading question, calling his attention directly to such matters, will pin him down to a direct answer—such a question finding its justification in the presumption that, since he is hostile to the questioner, he will not be led by the form of the question to favor such questioner by testifying falsely.

§ 150. **Witness must state facts, not conclusions.** In giving his testimony, a witness must state facts and not his opinion as to facts—or, as it is technically termed, he must not testify to conclusions (see §§ 117-18, above). And likewise, the examining attorney must not ask questions which call for conclusions. This rule is often illustrated when a witness testifies concerning a conversation which is relied upon by one side as constituting an oral

contract. When asked to give the substance of the conversation, he will, unless carefully instructed beforehand, usually answer somewhat as follows: "A and B agreed thus and so." What A and B *agreed* to, or whether or not they agreed to anything, or agreed at all, is one of the facts in issue in this kind of a case, and it is for the jury to decide whether or not there was an *agreement,* and if so, as to what, if anything. The witness's statement that they agreed is merely a statement that *in his opinion* they agreed—or an expression of his opinion as to one of the facts in dispute. As the jury should be left free to decide all the disputed questions of fact presented to them, basing their verdict upon other facts presented to them by the evidence and pleadings, and guided only by the instructions of the court and the arguments of counsel, such expressions of opinion by a witness are improper, and are nearly always objected to. The witness should have stated what the conversation actually was, literally, if he was able to, or else substantially—e. g., he should have stated: "A said this, and B said that, and then A said, etc."; or, "A said, in substance, that, etc." Similarly, in a prosecution for larceny, a witness should not make such a statement as "I saw the defendant steal the horse;" but he may state he saw the defendant take the horse. Whether or not there was a *stealing* is for the jury to decide, upon several other considerations besides the mere fact of *taking.* And other instances might be given. An exception to this rule is found in the case of expert testimony, discussed above (§§ 121, 124-25), where the witness is called upon to state his opinion as to certain facts.

§ 151. **Refreshing recollection.** A witness whose memory fails him as to a particular matter may be allowed, ordinarily, to refresh his recollection, if he is able to, by means of memoranda which he may have. In some cases, after consulting the memoranda, he is able to recall a fact and can then testify positively as to such fact from his present recollection—or from the recollection which he has at the time of the trial. In such case it is not necessary that the memoranda should have been made by the witness, as the memoranda themselves are not evidence. It is only the witness's testimony that is evidence; and he testifies independently from his present recollection—although such recollection is *aroused* by the memoranda. For example, a witness may not be able to recall whether or not he ever heard a certain conversation, or if he did hear it, what was said; and when was the time and what the circumstances. Upon being shown a letter written by one of the parties concerning the conversation, he may be able to recall the entire transaction, and to then testify about it fully.

§ 152. **Supplementing recollection.** Memoranda are used in another way, to *supplement* recollection, in many cases where a witness is unable to testify as to a certain fact from his present recollection, but can testify only that he made a memorandum of such fact, and that the statement which he made in the memorandum is true; or that he personally knows that a memorandum made by another was truly made. In such case, the memorandum must be identified by him as the memorandum referred to, and such memorandum is then admissible in evidence.

An instance of this often occurs when a witness is asked to give a list of certain goods, as for example, the contents of a store. This he may be unable to do, from his unaided memory, but he may remember that he made a correct inventory of such goods, which inventory may be identified by him and introduced in evidence. Or, a witness may be unable to recall the date of a certain happening, but may remember that he made a memorandum of such date while it was still fresh in his memory.

In all of the cases mentioned, both here and in § 151, it will be seen that the witness testifies in reality from his present recollection; in one case such recollection being aroused by the memorandum; and in the other his recollection being that the memorandum is a correct statement of the fact. In neither case is there any danger that the witness will be influenced to make a false statement by having suggested to him something about which his own recollection is not clear, as he relies upon his own recollection in both cases.

Section 4. Cross-Examination.

§ 153. **The cross-examination.** After a witness has finished his testimony on his examination-in-chief, the opposing side is allowed to cross-examine him on all of the matters concerning which he has testified. The purpose of the cross-examination is to enable the opposing counsel to discover and bring to the attention of the jury any false statement which the witness may have made in his direct testimony, and it is his most powerful and effective weapon for the purpose. By means of it, the witness's entire story may be gone over the witness being

required to give detailed descriptions, to explain the circumstances and surroundings, to give corroborative details, and to show, if he is able to, by his thorough knowledge of the facts concerning which he is testifying, by his ability to withstand the cross-examination without contradicting himself, and by his demeanor, that his statements are true, and therefore require no invention or explanation on his part to make them look plausible. A learned judge has said: "All trials proceed upon the idea that some confidence is due to human testimony, and that this confidence grows and becomes more steadfast in proportion as the witness has been subjected to a close and searching cross-examination; and this, because it is supposed that such an examination will expose any fallacy that may exist in the statement of the witness, or any bias that might operate to make him conceal the truth; and trials are appreciated in proportion as they furnish the opportunities for such critical examinations" (4). Another has said: "I have been thus particular in planting the power of cross-examination upon a foundation laid in authority, because of the sacred character of that right. The power of cross-examination is the most efficacious test which the law has devised for the discovery of truth. . . . The right to be confronted with the witness, and to sift the truth out of the mingled mass of ignorance, prejudice, passion, and interest, in which it is very often hid, is among the very strongest bulwarks of justice" (5). Greenleaf says: "The power of cross-examination has

(4) Justice Ruffin, in State v. Morriss, 84 N. C. 764.
(5) Justice Nisbet, in McCloskey v. Leadbetter, 1 Ga. 551.

been justly said to be one of the principal, as it certainly is one of the most efficacious tests, which the law has devised for the discovery of the truth. By means of it, the situation of the witness with respect to the parties, and to the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony and description, are all fully investigated and ascertained, and submitted to the consideration of the jury, before whom he has testified, and who have thus had an opportunity of observing his demeanor, and of determining the just weight and value of his testimony. It is not easy for a witness, who is subjected to this test, to impose on a court or jury; for, however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which a cross-examination may be extended" (6).

§ 154. **Scope of cross-examination.** A witness on cross-examination may be questioned on all matters concerning which he has testified on his examination-in-chief, and may also be asked questions intended to test his accuracy, veracity, or credibility, or to shake his credit by injuring his character; but otherwise, ordinarily, he may not be questioned on matters concerning which he has not testified in chief. In most states the cross-examination cannot be used as a cloak to cover an attempt by the cross-examiner to obtain from the witness testimony favorable to his own side of the case, though in some a cross-examination may cover anything it is desired to ask the

(6) 1 Greenleaf on Evid., sec. 446.

witness. But such cross-examiner may afterwards call the same witness as his own witness, examine him in chief, and then turn him over to the other side for cross-examination on his testimony so given.

§ 155. **Methods of cross-examination: Leading questions.** The methods used in cross-examining witnesses are as varied as the judgment, discretion, skill, intuition, and experience of generations of able counsel have prompted them to employ in dealing with the many phases of human nature which they have encountered. As it is the purpose of a cross-examination to expose falsehood, if there has been any, and as it is presumed that, if a witness has told the truth in his direct examination, he will stick to it and tell the same story on his cross-examination, and will not be influenced by any suggestion from the cross-examiner to favor the latter at the expense of the truth, leading questions are permitted on the cross-examination. An additional reason for permitting such questions is found in the necessity of the case, as a contrary rule would rob the weapon of cross-examination of much of its effectiveness. It is far easier for a witness, who may have sworn falsely on his direct examination, to evade direct answers to general questions asked of him on his cross-examination, than it is for him to escape committing himself on a question requiring a direct answer of "yes" or "no." And if he answers such a question falsely, his plain answer is on record for use in a charge of perjury against him.

§ 156. **Same: Trapping witnesses in falsehoods.** One or two instances may serve to illustrate, in general, the

process of cross-examination, although, from the nature of the case, probably no general classification of such processes or methods can be made. A witness, who had testified to the contents of a lost writing was believed by the opposing counsel to have testified falsely. On his cross-examination he was asked to state such contents again; and, not contradicting himself, he was led over other ground, and then asked to state them again, whereupon, for the third time he stated them the same way. The cross-examining counsel then consulted his minutes and asked the witness why he had stated such contents differently the first time, and the witness, fearing that he had contradicted himself (although in fact he had not), hesitated and made some excuse for his lack of memory on this point, and showed by his manner that he himself was not confident of having testified correctly as to the writing. Thus his testimony was discredited, whereas, if he had told the truth the first time, he would have stated subsequently, without hesitation, that he had stated the contents of the writing the same way each time, because that was the way they *were,* and he had no reason for stating them otherwise.

§ 157. **Same (continued).** In many cases a witness, who has testified to some happening, is asked to give the most minute details as to the time and place, the appearance of the locality, the position of surrounding objects, the weather conditions, and many things more which may suggest themselves to the mind of the cross-examiner—all of which the witness must fabricate more or less extemporaneously, if his story is not true. By leading him

over the same or portions of the same ground twice, the cross-examiner can sometimes obtain a contradiction, and sometimes a false statement which, if material, he can disprove by other witnesses. And very often, if the witness has glibly recited a memorized story on his direct examination, his hesitation in finding answers to the questions asked of him on cross-examination will expose such fact, since, if his story was true, he should be able to state most of the details of location, surroundings, etc., without hesitation—for, by association, they should stand out in his memory about as clearly as the main facts.

§ 158. **Same (continued).** Where a witness exhibits strong bias or prejudice in favor of the side calling him, he will often endeavor, on cross-examination, to ascertain what answers the cross-examining counsel desires, and to give contrary ones. Such a witness is often effectively dealt with by asking him a question in such form that apparently one answer is desired, whereas the truth requires an opposite answer, which the witness gives. For example, if a railroad company is charged with negligence resulting in a collision with plaintiff's wagon, by reason of running an engine at night without having its headlight burning, the defense may be that at the time of the collision it was still so light as not to require a lighted headlight for safety. A witness for the plaintiff, after being asked, on cross-examination, to describe surrounding objects, may be asked other questions in such form as to indicate distrust, on the part of the cross-examiner, as to the witness's having observed such objects carefully. If the witness is then asked whether or not there

was light enough to enable him to observe them carefully, he will often make some such reckless statement as: "Why, it was broad daylight." On the other hand, if he had said that it was dark, he would have discredited his statements concerning the surroundings, and would thus have thrown a doubt on all the rest of his testimony—and the shrewdest witness might hesitate before answering the question, which would also look bad for him, as such a simple question as whether it was dark or light ought to be answered by a witness who had actually been present, without hesitation. A trap of this sort is obviously more effective if the witnesses have been separated, and the witness in question has not had the benefit of the others' testimony.

Section 5. Re-Direct Examination and Impeaching Witnesses.

§ 159. The re-direct examination. After the cross-examination, the side which has produced a witness is allowed to re-examine him for the purpose of enabling him to explain discrepancies, if any, in his story; to go more fully into any matters which may have been brought out on cross-examination; and, in general, it might be said, to put all of his preceding testimony in satisfactory shape for submission to the jury.

§ 160. Impeaching credit of witness. In seeking to overcome the effect of the case made by the witnesses on one side of a case, the counsel for the opposite side, having broken down their testimony as far as possible on the cross-examination, may, of course, endeavor to disprove

their testimony by introducing evidence of inconsistent, or contradictory facts. In addition, he may try to discredit their testimony by showing inconsistent statements made by them out of court; or by introducing evidence reflecting on their character for truth and veracity. This is called "impeaching a witness," or "impeaching the credit of a witness."

CHAPTER VII.

WEIGHT, EFFECT, AND SUFFICIENCY OF EVIDENCE.

§ 161. Questions for jury. All questions as to the weight and sufficiency of evidence, and as to the choice between conflicting evidence, are for the jury. It is their duty to take into consideration the demeanor of the witnesses, their appearance and behavior on the witness stand, their character, so far as it has been brought out in the trial, their conduct under cross-examination, their interest in the controversy, if any, and to decide from all the evidence what is true and what is false. In cases where the trial is by the court without a jury, the court should be guided by the same considerations that guide the jury. In all ordinary trials there is no rule of law prescribing the amount or the kind of evidence necessary to prove a particular fact in issue, except that there must be enough evidence so that the jury can reasonably base its findings on the evidence, and not merely on guess-work, or on a determination by chance. Whenever there is enough evidence introduced in support of an alleged fact, so that the jury *can* reasonably find it to be true, they are at liberty to attach such weight to the evidence as they see fit, and to find such fact to be true. The converse of this proposition is equally true, and the jury are just as much at liberty to find the alleged fact not to be true—

unless the evidence is so overwhelmingly in favor of it that they *cannot* reasonably find it to be false. Within these limits the jury are the sole judges of the weight and sufficiency of the evidence. Outside of them, it is the duty of the presiding judge to direct the verdict one way or the other. A few exceptions to this rule will be noted below (§ 164).

§ 162. **Questions of law: Generally for court.** It should be noted also that the jury are the sole judges of the weight and sufficiency of evidence, only as respects the questions left to them for determination, which are ordinarily only the disputed questions of fact. Questions of law, which depend for their determination upon a knowledge of the statutes and decisions of the jurisdiction, are of course beyond the province of the jury, and are decided by the court, as are also what are known as mixed questions of law and fact—such as the interpretation of writings—which also require a knowledge of law.

§ 163. **Same: In criminal cases.** An apparent exception to the rule of the preceding subsection is found in criminal cases, where it is said that the jury are the judges of the law and the facts. Properly, this rule means no more than that an acquittal on any ground whatever, whether rightful or wrongful, cannot be disturbed because under our Federal and state constitutions an accused cannot be twice put in jeopardy for the same offence (1). Therefore, if the evidence is absolutely conclusive against a defendant and the jury nevertheless

(1) U. S. Const. V Amend; Ill. Const. of 1870, Art. II, sec. 10.

acquits him, the effect is the same as though they had declared the law applicable to the offence invalid. In Illinois, the rule is literally applied, and the jury, at the request of the defense, may be instructed that they are the judges of the law and the facts. Accordingly, also, arguments are often directed at the jury, by the defense, in an effort to have them declare an act unconstitutional, and authorities on constitutional law, interpretation of statutes, conflicts of laws, etc., are read to them by counsel on both sides—all of which is more or less of an absurdity, since such questions require a thorough legal education for their intelligent determination, and ought to be left entirely to the court.

§ 164. **Number and kinds of witnesses required in certain cases.** A few exceptions to the rule stated in § 161, above, are found in certain cases where statutes, or other rules of law, require particular facts to be proved by certain kinds of evidence. For example, under the United States Constitution, a conviction for treason requires the testimony of two witnesses to the same overt act (2); and generally an accused cannot be convicted on the uncorroborated evidence of an accomplice alone.

§ 165. **Instructions.** So much law as is necessary to guide the jury in its deliberations is given to them by the court in the form of instructions. For example, where a jury is required to find whether or not a defendant was negligent, or whether or not his negligence was the proximate cause of an accident, or whether or not a plaintiff

(2) Or a confession in open court; Art. III, sec. 3.

was guilty of contributory negligence, or whether or not the parties made a contract, the rules of law applicable to a determination of such questions are stated to them by the court, to be applied by them to their findings of fact.

§ 166. **Judicial notice.** The evidence introduced in the trial is supplemented by facts of which the court takes judicial notice, i. e., facts which the court knows to be true without any evidence to prove them. Such facts as a particular date falling on Sunday, the difference in time between New York and Chicago, the name of the President of the United States, etc., are matters of common knowledge, and are presumed to be as well known to the court as to other educated people. Therefore, it is not necessary to offer evidence in support of them, but, whenever they are material, they are simply assumed.

§ 167. **Presumptions.** The evidence introduced in a case is also sometimes supplemented by presumptions. Such a case is illustrated where an action is brought against a railroad company for damaging a piece of baggage, and it appears that the baggage has passed through the hands of a number of other companies, before being received and carried by the defendant and by it delivered to the plaintiff. At first impression these facts do not appear to make out a case against the defendant, since there is nothing to show that the damage was caused by it, and not by one of the other companies. But in such case the plaintiff is aided by a *presumption*—the presumption that the damage was caused by the *last company* which handled the baggage—since, there being no

evidence against any of the other companies, it is fair to suppose that it was delivered by them to the defendant in good order. Another presumption is known as the presumption of life—the presumption that a person who is shown to have been alive within a preceding period of seven years is still alive. But a person who disappears and is unheard of for a period of seven years by those who would be expected to hear from him, and who have searched for him, is, in the absence of other evidence, presumed to be dead—although there is no presumption as to the time of his death.

All of these presumptions may be overcome, or *rebutted* as it is termed, by contrary evidence. If, in the first case assumed, evidence is introduced to show that one of the companies handling the baggage before the defendant, damaged it, the presumption falls entirely, and the plaintiff is no longer aided by it; and similarly, in the second case, evidence of death within the seven years rebuts the presumption of life; and, in the case of seven years' absence, evidence of life within that period rebuts the presumption of death.

§ 168. **Same: By statute.** A somewhat similar principle is applied in many cases where a cause of action arises under a statute. Such statutes often provide that running a locomotive through the streets of a city without ringing a bell, or at night without having a lighted headlight; or driving a motor car above a certain rate of speed, shall, in the case of an accident, constitute a prima facie case of negligence. In such cases it is necessary for the plaintiff to show only the facts stated in order to place upon the defendant the burden of justifying his conduct.

§ 169. **Setting aside verdict.** In all civil cases a judge has the power to set aside a verdict which is "against the weight of the evidence," as it is said. This means that the judge can set aside the verdict and grant a new trial, when the verdict is so manifestly against the evidence that the jury could not *reasonably* have found the way they did—it being apparent that they were improperly influenced, or misled, in forming their verdict. But if the evidence *could* reasonably sustain the verdict, the judge should not set it aside, even though his own opinion might differ from the jury's. And in criminal cases, a verdict of *not guilty* cannot be set aside at all, since an accused cannot be twice tried for the same offence (§ 163, above). Even where an acquittal has been gained through improper influences brought to bear on the jury, the judge is obliged to discharge the defendant, and can do no more than helplessly protest to the jury against their aiding in a miscarriage of justice.

PLEADING

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INTRODUCTION.

§ 1. General description of pleading. Laymen sometimes imagine that the subject of pleading deals with the addresses or arguments made by lawyers to the jury. That is wrong. The pleadings are concluded before the jury is selected. The parties cannot try their case (and so a jury is useless) until it has been determined what the dispute is about. Usually the parties disagree as to the facts. To discover the exact disagreement, the law requires each party to state the facts on which he relies to win. These statements are the pleadings, and the law of pleading is the law governing the making of these statements. Naturally the plaintiff (or party who brings the suit) makes his statement first. The defendant (or

party sued) then makes his statement. The plaintiff may need to make a further statement. It is possible that the defendant may need to add something. If we remember that the pleadings are statements of facts and not arguments, and that the repetition of facts already stated is not permitted, we can easily see that the facts to be stated will soon be exhausted and the pleadings come to an end. An illustration will make the matter clearer. The plaintiff states that he owned a piece of land and that the defendant entered the land and cut down a tree. The defendant states that the plaintiff gave him permission to do so. The plaintiff replies that the permission was revoked. Usually the defendant would have nothing more to say except to deny the revocation of the permission. The pleadings would thus end. The only dispute between the parties is seen to be over the alleged revocation of the permission (1). That question then is to be tried by the jury, which must now be selected or empanelled.

§ 2. **Pleadings necessary in all cases.** Sometimes there is no real dispute concerning the facts; one party simply refuses to do what he knows he ought to do. But even then pleadings will occur. The party wronged will sue and allege the facts. The other party should admit them; but, since he is an intentional wrongdoer, we may be sure that he will deny them and thus make the plaintiff prove them (2). Even if the defendant should admit the facts

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(1) For a case with pleadings similar to these, though more complicated, see Bartlett v. Prescott, 41 N. H. 493.

(2) See an example in Gould v. Boston Excelsior Co., 91 Me. 214.

and allege no new facts on his side, yet we should have the pleading of the plaintiff alleging his facts (3). So in all cases pleadings are used.

§ 3. **The three systems of pleading.** In the preceding volumes of this work the reader has become familiar with the two systems of law which exist in English speaking countries, law and equity. Each of these systems was administered by courts of its own. And likewise, each had a system of pleading of its own. So we have Common Law Pleading and Equity Pleading. The period from 1775 to 1850, roughly speaking, was a period of great reform in our law. The subject of pleading received especial attention from the reformers. Both the common law system and that of equity seemed defective to them. The result was that in 1848 New York passed a code (or general statute) creating a new system of pleading. This example has been followed in many states, and in England and many of her colonies. This new statutory system of pleading is called Code Pleading. It supersedes both common law and equity pleading in those jurisdictions where it has been adopted. In the other jurisdictions common law and equity pleading remain. The former jurisdictions are commonly called code jurisdictions (or in this country, code states); the latter are called common law jurisdictions (common law states). Even in common law jurisdictions the pleading, whether at law or in equity, has been modified more or less, by statute.

§ 4. **Territorial distribution of three systems.** Roughly speaking, the following are common law jurisdictions:

(3) McGehee v. Childress, 2 Stew. (Ala.) 506.

Alabama, Arkansas, Delaware, District of Columbia, Florida, Hawaii, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, West Virginia. Louisiana is peculiar in that its pleading is derived from the civil law (or modern Roman law). It will be remembered that the civil law is the law of Europe, except England and Ireland, and that it was never adopted in this country or Canada, except in Louisiana and Quebec. That these jurisdictions should be exceptions is due, of course, to their French settlement. All the other states and territories on this continent have code pleading. The Federal courts form a jurisdiction of their own and Congress has power to regulate their procedure. Congressional statutes have provided that in equity cases the equity pleading shall be adopted, while in common law cases the pleading of the state in which the court is sitting shall be used (4). Thus, in Illinois a Federal court in a common law case would use common law pleading. In New York, a Federal court in a common law case would use code pleading. In both states, in an equity case, a Federal court would use equity pleading.

§ 5. **How treated.** In the following pages the three systems of pleading will be taken up separately. But the treatment of Equity Pleading and of Code Pleading will presuppose a study of the part on Common Law Pleading. The more fundamental matters are the same under all three systems, and in the space allotted to this subject cannot be repeated.

(4) U. S. Rev. Stats., secs. 913, 914.

PART I.

COMMON LAW PLEADING.

CHAPTER I.

NAMES AND FUNCTIONS OF PLEADINGS.

§ 6. **The plaintiff's declaration.** The first pleading put in is, as we have seen, the plaintiff's statement of the facts on which he relies to win. This is called the *declaration*. It must state facts which under the law give the plaintiff a right to recover. Obviously anything less would be useless. Suppose a plaintiff's declaration says that the defendant is the brother of the plaintiff, that the plaintiff asked the defendant for fifty dollars, that the defendant refused to give fifty dollars to the plaintiff. Such a declaration is defective because it states no cause of action, the law not requiring one brother to give another fifty dollars, or any other sum. Suppose a declaration says that the plaintiff was living with his uncle in a certain house (describing it), and that the defendant entered the house. This declaration is defective, because it does not show that the plaintiff was in possession of the house, and, generally, one cannot sue for an unlawful

entry unless he is in possession of the property entered (1). Facts which create a cause of action are not stated.

§ 7. **A prima facie case sufficient.** But we must hasten to explain that the declaration need not allege enough facts to show a cause of action absolutely. It is enough if the facts alleged, without others, prima facie indicate a cause of action. Thus, suppose the declaration alleges that the plaintiff was possessed of a house (describing it), and that the defendant entered it. Now enough facts are stated. Yet, of course, if the defendant had the plaintiff's permission to enter, no cause of action arose. But it is for the defendant, when his turn comes, to allege the permission. So, if the defendant was an officer with a search warrant authorizing him to enter, the plaintiff need not deny this in his declaration in order to make his declaration good, but the defendant must allege this defense (2). So, if the action is for breach of contract, the plaintiff need not allege that the defendant was an adult when he made the contract (3). Plainly, as a general rule, the plaintiff cannot recover unless the defendant was an adult. But it is for the defendant to set up his infancy (4). Many facts, then, which are essential to a cause of action, need not be alleged by the plaintiff in his declaration. He need allege only enough facts to make out a prima facie case.

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(1) Halligan v. R. R. Co., 15 Ill. 558.
(2) See, for an analogous case, Allen v. Parkhurst, 10 Vt. 557.
(3) Jarman v. Windsor, 2 Harr. (Del.) 162.
(4) See the case cited in note 3.

§ 8. **What constitutes a prima facie case.** How is one to tell what facts are necessary to make out a prima facie case, and what are not? There is no rule. Each case is solved on its own merits. Thus, take the case just supposed. Why does not the plaintiff have to allege that the defendant was an adult when he made the contract? Because most people who attempt to make contracts are adults. So the defendant, who is relying on the unusual fact of an infant (or person under age) attempting to make a contract, must allege such fact. So the plaintiff need not allege that the defendant was sane, since again most people who attempt to make contracts are sane.

If the plaintiff had to allege every fact necessary to show an unanswerable cause of action, it is plain on reflection that his declaration would be enormously long. Every possible defense to the action would have to be thought of and the contrary facts alleged in the declaration. It is necessary, therefore to divide the duty to allege facts, and that division is made on lines of convenience and good sense. In an action for a negligent injury, it is generally held that the plaintiff need not allege freedom from contributory negligence (5). This may best be explained by the thought that negligence is more likely to be observed than care. A reckless driver attracts attention. So it will be easier for the defendant to prove that the plaintiff was himself negligent, if such was the case, than it would be for the plaintiff to prove his due care, if that was the fact. Generally one who alleges a fact has to prove it. And so, since the defendant

(5) Hickman v. Railroad Co., 66 Miss. 154.

should be compelled to prove contributory negligence, it follows that he should allege it. Space is lacking for other illustrations of how it is settled what facts the plaintiff must allege, and what the defendant must allege. Of course, today, nearly all the facts likely to arise have been passed on by the courts, and assigned either to the plaintiff or to the defendant to allege. We shall have more to say of this hereafter.

§ 9. **The defendant's plea: Traverses. Pleas in confession and avoidance.** Assuming now that the plaintiff has drawn and filed his declaration, what is the defendant to do? If the plaintiff has alleged some fact which is untrue, the defendant plainly may deny the fact. This denial is called a *traverse.* But, if all the facts alleged are true and show a prima facie cause of action, the defendant must set up some defense or he will lose. When he sets up such a defense he, of course, tacitly admits the facts alleged in the declaration and avoids their effect by alleging his defense (6). Such a pleading is called a *confession and avoidance.* By not denying them, it *confesses* the facts alleged in the declaration, and *avoids* them by showing that, despite them, the plaintiff cannot recover. Whether the defendant uses a traverse, or a confession and avoidance, his pleading is called a plea. So we have pleas by way of traverse (denial), and pleas in confession and avoidance (setting up new facts constituting a defense). Suppose the action is for a battery. The only allegation necessary to make out a prima facie case is that the defendant beat the plaintiff. If this is

(6) Eavestaff v. Russell, 10 M. & W. 365.

alleged, but is not true, the defendant will use a traverse denying the fact. But suppose the beating occurred, then, if the defendant denies the fact and the case goes to trial on that question, plainly he will lose (7). So he must allege any defense he has. For example, if the defendant was an officer, and beat the plaintiff necessarily, in order to arrest him under process issued authorizing the plaintiff's arrest, that is a good defense (8). The defendant then would tacitly confess the beating by not denying it, but avoid liability for it by setting out the above facts as a defense. Either mode of defense, then, a traverse, or a plea in confession and avoidance, is open to the defendant.

§ 10. **Demurrer by defendant.** But there is another course open to the defendant. Suppose the declaration does not state facts enough to make a prima facie cause of action. Surely the defendant may object to it in such a case. He does this by what is called a demurrer. A demurrer reads: "And the said defendant, by his attorney John Jones, says that the declaration is not sufficient in law." This means that, granting the truth of all the plaintiff has said, he has no cause of action against the defendant—not even a prima facie cause of action. Suppose the plaintiff sues for the breach of a convenant of warranty, and, in his declaration, states that the defendant, in a deed of property to the plaintiff, warranted the title and possession against all lawful claimants; also states the execution and delivery of this deed; and that

(7) Kerwich v. Steelman, 44 Ga. 197.
(8) Leib v. Iron Co., 97 Ala. 626.

the plaintiff performed everything on his part; but fails to state that the plaintiff was evicted from the premises, which would be the breach of the covenant. The defendant could demur. A declaration on a covenant of warranty must allege a breach. No prima facie cause of action being stated, the defendant's demurrer would be sustained and the plaintiff would lose the case (9). He could, of course, begin a new action making an allegation of an eviction. But the first case would be lost. However, in all common law states today by statutes, the plaintiff would usually be given an opportunity to amend his declaration, and so would not be driven to start all over again.

The defendant then, may demur or plead. And, if he pleads, his plea may be a traverse, or a plea in confession and avoidance.

§ 11. **Effect of traverse, confession and avoidance, or demurrer in ending the pleadings. Issues of fact and of law.** Is the case now ripe for the empanelling of the jury and the trial? This will depend on how the defendant has pleaded. Suppose, first, that he has put in a traverse, denying some fact alleged in the declaration. Plainly the dispute between the parties is discovered and the case, so far as the pleadings go, is ready for trial. It is said that a traverse raises an issue of fact. We can now understand that phrase. It means that a traverse shows the fact that is disputed by the parties. This dispute is called the issue. It is about a fact, and so is called an issue of fact. When a traverse is used to deny

(9) Wilford v. Rose, 2 Root (Conn.) 14.

a material fact, an issue of fact is made which is ready to be tried, and so no further pleadings are necessary or possible (10).

Suppose, secondly, that the defendant demurs to the declaration. This cannot make an issue of fact, because a demurrer admits the facts alleged and simply raises the question of law, whether those facts constitute or show a prima facie cause of action (11). This question of law is also called an issue—an issue of law. The dispute here is not as to the existence of any fact, but as to the existence of law which makes the facts alleged by the plaintiff a prima facie cause of action. Law is to be decided by the court and facts are to be determined by the jury. Therefore, an issue of law goes to the court for decision, while an issue of fact goes to the jury for decision. In neither case is there any need for further pleadings.

But, thirdly, the defendant may have used a plea in confession and avoidance. Is the case now ready for trial, either by the court or by a jury? This depends on whether an issue, either of law or of fact, has been raised. Obviously a plea in confession and avoidance raises no issue of fact. It sets up new facts as a defense. But, until one of those new facts has been denied by the plaintiff no issue of fact has arisen. Possibly the plaintiff may admit those new facts, and avoid their effect by still further new facts. Therefore, it cannot be assumed that those new facts set up by the defendant are controverted

(10) Solomons v. Chesley, 57 N. H. 163; Hapgood v. Houghton, 8 Pick. 451.

(11) Hobson v. McArthur, 3 McLean (Fed.) 241.

by the plaintiff, until the plaintiff in fact denies them. Nor does a plea in confession and avoidance raise an issue of law. That can only be made by a demurrer. So, then, when the defendant uses a plea in confession and avoidance, no issue is raised and further pleadings are necessary (12).

§ 12. **The plaintiff's replication: Similarity to the defendant's plea.** Of course, the next step must be taken by the plaintiff. Suppose the plaintiff's declaration sets out a promissory note, its execution by the defendant, and its non-payment. The defendant might plead in confession and avoidance, alleging that six years have elapsed since the note became due. This plea would be based on a statute of limitations limiting suits on notes to six years. How may the plaintiff reply to this plea? He may use a demurrer, a traverse, or a pleading in confession and avoidance. In other words, he may use the same means in combating the plea, that we have seen the defendant may use in combating the declaration. An illustration of each method will be helpful.

The plaintiff, first, may demur. If the plea were worded as stated above, the demurrer would be overruled, as the plea is good. But suppose the plea read that six years have elapsed since the making of the note. Then, on the demurrer, the plaintiff would win (13). The plea is bad because the statute of limitations does not begin to run until the cause of action or right to sue accrues, and six years must elapse from then before the

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(12) Rushing v. Key, 11 Sm. & M. (Miss.) 191.
(13) Banks v. Coyle, 2 A. K. Marshall (Ky.) 564.

suit is barred. To say that six years have elapsed since the making of the note is not at all a statement that six years have passed since the right to sue accrued, for it is possible that the note was a time note and not due as soon as made. If, indeed, it appeared in the declaration that the note was due as soon as made, then the second form of the plea would not be defective (14). This illustrates how a plea may be demurrable.

Secondly, the plaintiff may use a traverse. He may deny that six years have elapsed since the note became due. This would raise an issue of fact to be decided by the jury.

Thirdly, the plaintiff could plead in confession and avoidance. Thus, a new promise to pay waives the statute of limitations to the extent that it has run when the new promise is made. The statute begins to run again from the time of the new promise. So the plaintiff might allege that the defendant made a new promise to pay the debt, within six years before the commencement of the suit (15). This allegation would avoid the effect of the plea, while tacitly admitting its truth, and so would be in confession and avoidance. A traverse, or pleading in confession and avoidance, used to combat a plea is called a *replication*. So, then, to the defendant's plea in confession and avoidance, the plaintiff may demur, or plead a replication by way of traverse, or a replication by way of confession and avoidance.

§ 13. **Further pleadings: Their names.** This alter-

(14) Aldrich v. Williams, 12 Vt. 413.
(15) Whitney v. Bigelow, 4 Pick. 109.

native pleading may in theory go on indefinitely, so long as nothing but pleadings in confession and avoidance are used. If either party demurs, an issue of law is made and the case goes to the court for decision. If either party traverses, an issue of fact is made and the case goes to the jury for decision. But, so long as pleadings in confession and avoidance are used, no issue is made and the pleadings must continue. But, as a practical matter, as stated earlier, the pleadings can never continue far because the new facts to allege as a new avoidance run out. Pleadings beyond the replication are unusual. However, they may occur. Thus, in the case we have been discussing, the defendant may meet the replication of the new promise by alleging that the new promise was obtained by duress (16). Such a pleading by the defendant, in answer to the replication, is called the *rejoinder*. The plaintiff may then continue with a *surrejoinder*. The defendant may then use a *rebutter* (17), and the plaintiff again a *surrebutter*. Names have not been devised for the possible further pleadings.

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(16) For an analogous case, see Bulger v. Roche, 11 Pick. (Mass.) 36.

(17) For an instance of its use, see Palmer v. Stone, 2 Wilson (Eng.) 96.

CHAPTER II.

FORMS OF ACTION.

§ 14. **What forms of action are.** The system of common law pleading is greatly complicated by the use of what are called "forms of action." All the almost innumerable causes of action, battery, conversion, negligent injury, breach of contract, slander, and the others, are divided into groups, and any cause of action in a given group has to be proceeded with in court, in accordance with the forms prescribed for that group. These groups have names. Thus one group is called trespass. This includes actions for a battery, an assault, a false imprisonment, an entry on land, a taking of goods from the plaintiff's possession, and some other similar wrongs. Any cause of action which falls within this group must be proceeded with in court in the forms prescribed for trespass (1). Trespass then is a form of action. It is the name given to the method of proceeding in any cause of action falling within that group. When we speak of the action of trespass we mean the form of action (forms of proceeding) called trespass. If we speak of a trespass to land, we mean such an injury to land as falls within the group called trespasses, and which must be proceeded with in court in accordance with the forms

(1) Garraty v. Duffy, 7 R. I. 476.

of the action of trespass. Trespass to the person or to goods means the same thing. Of course, forms of proceeding in an action of trespass and in the other forms of action are prescribed, not only for the pleadings but for all the other proceedings in the case; the original writ, the various processes to make the defendant appear, the form of judgment to be rendered, and all the other possible acts to be done, or documents to be issued in the case. But our study of the forms of action will be confined to their differences as to the pleadings. And it is in the pleadings that the most conspicuous differences exist.

§ 15. **Classification of actions. Real actions.** In the books it is generally said that forms of action are divided into real, personal, and mixed. A real action is defined as one to recover real property alone, for example, an action to recover land. A personal action is one to recover personal property, chattels, or money. A mixed action is one to recover land and money (2). This classification, however, is of no value today. The distinction between real and mixed actions never was wholly true to the facts, for in many so-called real actions damages in money were recoverable. Then, in 1834, almost all the actions called real actions were abolished by statute (3). In the middle ages when these actions were being formed by the courts, land was looked on with such regard that it was though necessary to make the procedure in an action to settle title to land very slow, so

(2) Hall v. Decker, 48 Me. 255.
(3) 3 & 4 William IV, ch. 27, sec. 36.

that the greatest certainty would be arrived at by the judgment. This slowness of procedure, with its incidental great expense, led to their abolition. In the United States, also, they were either expressly abolished or became obsolete. In this chapter we shall discuss actions under the heads: (a) actions to recover land; (b) contract actions; (c) tort actions. The two latter are personal actions.

SECTION 1. ACTIONS TO RECOVER LAND. EJECTMENT.

§ 16. **Modern actions to recover land.** Today, in the common law states, the forms of action to recover land, with or without damages, are ejectment, trespass to try title (purely statutory and confined to Texas), writ of entry (an old real action surviving in Massachusetts, Maine, and New Hampshire, but in a greatly modernized form), and forcible entry and detainer. Trespass to try title is the Texas form of ejectment (4). Writ of entry is the substitute for ejectment in the three states where it is used (5). So what we really have is ejectment and forcible entry and detainer. The latter is a summary proceeding to obtain possession of realty wrongfully entered upon or wrongfully detained. The word "forcible" is a survival of the time when the action was criminal in its nature, and actual force on the part of the defendant had to be proven in order to maintain the action. Today the action is civil, and generally actual force is unnecessary. Indeed, the most common use of the action is made by landlords in regaining possession from tenants, who

(4) Hays v. Railway, 62 Texas 397.
(5) Smith v. Wiggin, 48 N. H. 105.

wrongfully fail to give up possession when their leases have expired. The forms of proceeding in this action are wholly governed by local statutes, and space is lacking for any discussion of them. Such a discussion would throw little light on the nature of common law pleading, and so it may be omitted without loss.

§ 17. **Origin of action of ejectment.** The pleadings in an action of ejectment are very simple, but they have an exceedingly interesting history. They are also very instructive in illustrating how the law, in its earlier history, grew by the adoption of fictions. We may therefore give them some attention. Ejectment was originally an action by a lessee of land to recover damages against one who had ejected him from the land. At first it resulted only in a recovery of damages. But equity took jurisdiction to put the lessee back in possession. This led the common law courts, jealous of the growing jurisdiction of equity, also to order the sheriff to put the lessee back in possession. So the lessee in an action of ejectment, if he succeeded, recovered back his possession, and obtained damages for the wrongful interference with it. When it became apparent that the real actions were too dilatory and expensive for continued use, the lawyers and courts hit upon the expedient of using the action of ejectment to try title to land.

Suppose D is in possession of land that C claims. C would take possession of the land surreptitiously, and then make a lease of it to T. T would then take possession. When D discovered T in possession, he naturally would eject him. Then T would bring an action of eject-

ment against D for ousting him. The parties to this action would be T, on the demise of C v. D. "On the demise of" meaning, of course, under a lease from C (6). In this action T, in his declaration, would allege (1) that C has title, (2) that C leased to T, (3) that T entered into possession, and (4) that D ejected him. Obviously the second, third, and fourth allegations were plainly provable and the only possible real contest was over the first. Thus, the question was raised whether C really had title as against D. If T proved C's title, he was put into possession by order of the court, and he, then, immediately surrendered to C. Thus C recovered the land against D.

§ 18. **Introduction of fictions in ejectment.** The unpleasantness of an actual ouster of T by D was avoided by the introduction of the so-called "casual ejector." After the lease to T and his entry into possession, E, the casual ejector, some person selected of course by C, entered and put T off the land. T would then sue E in ejectment. But plainly it would not be fair to D to let T obtain the possession by merely recovering of E. So it was held that, when suit was brought by T against E, notice of the suit must be given D that he might have an opportunity to defend it. If he didn't come in and defend, then to order him dispossessed by the sheriff in favor of T would be fair enough. Finally, it was decided that there was no use in going through the farce of a lease by C to T, an entry by T, and an ouster by E. It was held that, if D wished to defend the case, he would

(6) See Doe dem. Evans v. Roe, 2 Ad. & E. 11.

have to consent to admit the lease, entry, and ouster, and simply deny C's title. This was called the "consent rule." T would bring his action, making the same allegations as above, and would sue the casual ejector. Notice would be given to D. D would be admitted to defend, on his consenting to deny C's title alone. Thus the lease, the entry, the ouster, and the casual ejector all became fictions. The name John Doe came to be generally used for the fictitious tenant, and the name Richard Roe for the fictitious casual ejector (7).

Out of the old action by a tenant to recover a leasehold had been formed an action to try title, in which there really is no tenant and no leasehold. Three of the four allegations in the declaration are fictions and cannot be denied by the defendant. He can deny only the real plaintiff's (C's) title (8). This he denies by a plea called *not guilty*. It reads: "And the said D, by L his attorney, says that he is not guilty of the said supposed trespass and ejectment above laid to his charge, or any part thereof, in manner and form as the said T hath above thereof complained against him." How did it happen that when the defendant desires to deny the plaintiff's title he says that he is not guilty of the ejectment? That seems to deny the ouster rather than the plaintiff's title. This question compels us to consider a form of pleading that we have not so far discussed—the general issue.

§ 19. **The general issue: Explained by its use in ejectment.** In each of the various forms of action there finally

(7) See 3 Blackstone's Commentaries, 199 et seq.

(8) Cumming v. Butler, 6 Ga. 88.

came to be so-called *general issues.* This term was applied always to a traverse. It might better have been called a general traverse. The issue, as we have seen (§ 11, above), is the disputed fact which the traverse denies. A general issue would then naturally mean all the disputed facts denied by a general traverse. But the term general issue is in fact used to mean the general traverse itself. It is no doubt true, though the evidence is not as complete as it might be, that all the general issues were specific traverses originally; that is, they denied some one fact and not several facts. Thus, in ejectment, no doubt the general issue of not guilty (quoted above) originally denied merely the ejectment or ouster. But this sort of case seems to have been constantly arising: a defendant would plead not guilty of the ejectment, and then expect to prove that he was not guilty by showing that the plaintiff had no lease of the property (of course this occurred before the lease became fictitious). If the plaintiff had no lease, he could not recover for any ouster he may have suffered at the defendant's hands. The argument of the defendant was that, therefore, he was not guilty of any wrongful ejectment of the plaintiff, and so he should be allowed to prove the plaintiff's lack of a lease under the plea of not guilty. This line of argument, though unsound as we shall presently try to show, was nevertheless upheld by the early courts; and thus the plea of not guilty of the ejectment was permitted to deny, not only the ejectment, but also the lease to the plaintiff. The same reasoning, of course, applied to the allegation of the tenant's entry under the lease. Under

early real property rules, the tenant really got his interest in the land from the time he entered under the lease. If he had made no entry and so had no interest in the land, the ejectment was no legal wrong to him. And likewise, if the plaintiff's lessor (C above) had no title, the lease to the tenant was invalid, and therefore the defendant had not violated any interest the plaintiff really had, for he had none. Thus, when the defendant used the plea of not guilty (quoted above), he was permitted, in proof of that plea, to disprove any one of the four allegations in the declaration. Having this broad effect, it was natural that it should come to be called a general traverse. And, as above explained, it was called a general issue. Very much this same enlargement of the scope of some specific traverse into a general issue occurred in nearly all the forms of action. The development above explained is typical. A general issue, then, is a traverse, which has been extended beyond its natural meaning and made to deny a number of facts together.

§ 20. **Same: Broadening its scope unwise.** Why is the reasoning on which this extension was made unsound? First, it will be noticed that the result of it is bad. The chief object of pleading is to notify the other party of the facts that his opponent is going to rely on. If the defendant may plead not guilty of the ejectment, and then, at the trial, disprove either the plaintiff's lease, or his lessor's title, or indeed the entry under the lease, or the ejectment, it is plain that the notice he gives the plaintiff by his plea is very indefinite. He notifies him merely that he is going to rely on some one of several defenses.

But this is not all. In some of the forms of action, not only could a defendant, who had pleaded the general issue, disprove, under that one plea, all the facts alleged in the declaration, but he could also prove defenses which were not denials at all but new affirmative defenses that should be pleaded in confession and avoidance. Thus, suppose that the defendant wants to prove that he put the plaintiff off the land in accordance with legal process. The same argument, on which the defendant can disprove the lessor's title or the lease, applies to this defense also. The plaintiff has no right to recover for an ejectment, which was done under proper legal process. So the defendant is not guilty of any wrongful ejectment. Thus, almost all defenses could be proven under the general issue (9). This made the plea of the defendant quite worthless as notice to the plaintiff of the defense the defendant would rely upon. The defendant may plead the general issue and rely on almost any defense. The plaintiff must come to the trial prepared to disprove almost every possible defense. The cost of bringing witnesses to court to disprove all possible defenses would be great and totally unnecessary, when we consider that no doubt the defendant will not rely on more than two or three defenses at most. Of course, the plaintiff did not in fact prepare to meet all possible defenses, but tried to guess what defenses the defendant would think he had, and then brought witnesses to disprove these only. But we notice here: (a) that the plaintiff is guessing at the defendant's defenses, when the chief object of

(9) Pillow v. Roberts, 13 How. (U. S.) 472.

pleading is to give him notice of them; and (b) that, if he guesses wrongly, he may come to trial unprepared to meet some defense which the defendant does attempt to prove. The practical objections, then, to the general issue in its broad form are great.

§ 21. **Same: Broadening its scope erroneous.** But the reasoning, on which the broad scope of the general issue was founded, was itself logically erroneous. Pleadings are to allege facts, not legal conclusions. The plaintiff in his declaration must set forth the facts he claims are true. If, instead, he simply states that the defendant has injured him, that will not do. It does not give the defendant any notice of what kind of an injury the plaintiff is suing for. A personal injury arising from the defendant's negligence, a slander or libel, a trespass on land, even a breach of contract, might be meant by the assertion that the defendant injured the plaintiff. The plaintiff must plead the facts which constitute his injury: then the defendant will know its nature. So, when, in an action of ejectment, the plaintiff says (1) that C owns land, (2) that C leased to T, (3) that T entered, and (4) that D ejected T, each one of these allegations is a statement of a fact (subject to later explanation) and not of a legal conclusion. Statement (4) means that D put T off the land, and does not mean that D committed a wrongful ejectment of T. The latter is a conclusion to be drawn from all the facts that the plaintiff has alleged. Then, when the defendant denies statement (4), logically and in reason he is denying merely the physical act of removing the plaintiff from the land. He is not deny-

ing the legal conclusion that he wrongfully ejected the plaintiff. In fact, it is settled law that a traverse of a legal conclusion is a worthless traverse (10); one must traverse facts. Legal conclusions can neither be stated, nor traversed if stated. But these well settled principles of pleading were all violated in giving to the general issues their broad scope. Not only was the defendant allowed to deny a legal conclusion, but he was allowed to deny a legal conclusion that the plaintiff really had not alleged.

§ 22. **General issue and subsequent pleadings in ejectment.** But, in common law pleading, the general issues and their scope are established law, no matter how much they violate the general rules of pleading. In ejectment, therefore, the plea of not guilty of the ejectment was allowed to be used, no matter what the defendant's defense was (11). The only limit on this statement arises out of the consent rule explained above (§ 18). That would prevent the defendant by any pleading from denying the lease, entry, or ouster (12). Thus, the general issue of not guilty did not deny the ouster, the very fact which originally was the only fact it did deny. In ejectment, then, the plaintiff in his declaration alleges four facts. Three of these he does not have to prove, because they are fictions. The fourth is denied by the general issue, and further, under this plea of the general issue, the defendant may prove any affirmative defense he may

(10) Cane v. Chapman, 1 Nev. & Perry, 104.
(11) Pillow v. Roberts, 13 How. (U. S.) 472.
(12) Cumming v. Butler, 6 Ga. 88

have. No other plea is necessary. Not guilty permits the defendant to rely on any affirmative defense. Further, no replication is necessary. When there is a traverse put in, it has been explained above (§ 11) that the other party cannot plead further but must join issue, unless he thinks the traverse itself bad and then he may demur. Now the general issue of not guilty is a traverse. Therefore, there could be no replication to it. This logical result was not varied from when affirmative defenses, that should be pleaded in confession and avoidance, were allowed to be proven under the general issue. So even then the plaintiff could plead no replication. But suppose the plaintiff, in reply to some affirmative defense that the defendant is likely to rely on, has a good affirmative replication, is he to lose the advantage of this because he cannot plead it? No. He may prove it without pleading it (13). So, if he can traverse the defendant's affirmative defense, or if he can avoid it, he may do so without pleading a replication containing the traverse or the avoidance.

Section 2. Contract Actions.

§ 23. **Personal actions: Contract actions.** The pleadings in ejectment are more fictitious and illogical than in any other form of action. For that reason it has been chosen for more detailed discussion. But all the forms of action are more or less affected by the same defects. A more cursory explanation of the others may now be attempted. We have spoken already of the real or mixed

(13) Rogers v. Clifton, 3 B. & P. 587.

actions, so far as we need notice them. We have left for consideration the personal actions, the actions in which chattels or money is the recovery sought.

Personal actions are divided into contract actions and tort actions. The names of the common contract actions are debt, covenant, special assumpsit, and general assumpsit. Actual contracts, contracts really made by the parties and not mere obligations created by law, are either sealed contracts or simple contracts. These four forms of action are designed to cover all possible causes of action that may arise on actual contracts. Covenant is never used except when the suit is on a sealed contract (14). The two forms of assumpsit, on the other hand, can be used only if the suit is on a simple contract (15). Debt, curiously, may be used to recover on either kind of contract (16). This would mean that covenant and assumpsit are exclusive of each other and debt covers the ground of both. But there are limits on the scope of debt which prevent any such broad statement. Debt will not lie on a sealed contract, unless the suit is for some definite sum of money (17). Thus, if the suit is for damages for breach of a sealed contract, covenant alone will lie. Originally, it was only for indefinite sums that covenant would lie. So once covenant and debt were exclusive of each other. But finally, the judges permitted covenant to be used (that is the action of covenant, the forms of proceeding called covenant), even when the sum

(14) Ludlum v. Wood, 2 N. J. L. 52.
(15) Johnston v. Salisbury, 61 Ill. 316.
(16) Smith v. Meetinghouse, 25 Pick. 177.
(17) Fox River Co. v. Reeves, 68 Ill. 403.

sued for was a liquidated amount (18). This change made covenant and debt overlap, in the case of suits on sealed contracts for definite amounts.

§ 24. **Contract actions (continued).** Now debt on a specialty (sealed contract) was really a separate form of action from debt on simple contract. The pleadings in these two forms of debt were different. The limitation on debt on simple contract was that it would only lie, where the plaintiff is suing for the price of some thing or some service which the plaintiff has given to or for the defendant. Thus, here also, as well as in the case of debt on a specialty, debt will not lie for damages (19). Special assumpsit is the form of action to recover damages for breach of a simple contract (20). General assumpsit is concurrent with debt on simple contract (21). Special assumpsit also is concurrent with debt on simple contract. Let us summarize this. To recover damages on a sealed contract, covenant is the only action allowed. To recover damages on a simple contract, special assumpsit is the only available action. To recover a definite sum due by a contract under seal, either debt on a specialty or covenant may be used. To recover the price of something, due by a simple contract, the plaintiff may use either debt on simple contract, general assumpsit, or special assumpsit. The complicated history by which these forms of action were developed, and came to overlap each other to the extent just stated, is beyond our present purposes.

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(18) March v. Freeman, 3 Levinz, 383.
(19) Deberry v. Darnell, 13 Yerg. (Tenn.) 451.
(20) Drury v. Merrill, 20 R. I. 2.
(21) Hickman v. Searcy, 17 Yerg. (Tenn.) 47.

We must now hastily glance at the pleadings in each of them.

§ 25. **Action of covenant.** In an action of covenant the declaration stated (1) the defendant's promise under seal (22); (2) the *performance* of any express conditions *precedent* to the defendant's liability (23); (3) the *readiness and offer to perform* any express conditions *to be performed concurrently* with the defendant's performance; and (4) the breach of promise by the defendant (24). Of course it will be understood by the reader that this means that the actual promise must be alleged, a statement that the defendant made a promise, but not stating what promise, being insufficient. And so of the other allegations. A statement that the defendant broke his promise will not do. The plaintiff must state some specific act or omission by the defendant, that was a breach of the promise. Notice then that the above facts constitute a prima facie case for the plaintiff. If other facts are present, such as coveture, infancy, duress, or what not, which would destroy the plaintiff's action, they will be matters in confession and avoidance (25). None of the allegations in the declaration were fictions. The general issue in covenant is *non est factum.* This obviously means that the defendant *did not make* the promise under seal, and that defense was admissible under it. The execution of the deed (specialty, promise under seal)

(22) Perkins v. Reeds, 8 Mo. 33. This case is erroneous on other grounds.

(23) Bane's Heirs v. M'Meekin, 4 Bibb (Ky.) 27.

(24) Relyea v. Drew, 1 Denio, 561.

(25) Wilcox v. Cohn, 5 Blatchf. 346.

alleged, in point of fact would be, on principle, the only thing denied by this general issue. But the courts, overlooking the distinction between allegations of fact and allegations of law, held that any fact showing that the deed was absolutely void *in law* could be shown under non est factum; since, if void, the defendant had not legally made it. Of course he had executed it *in fact.* But the statement that he made the promise under seal was considered as a statement that he had made a legally binding promise, and so non est factum was allowed to deny that conclusion of law. Thus, coverture (26) or lunacy of the defendant could be proven under non est factum. Infancy could not, since it did not show that the defendant had made no legally binding promise, but only that the defendant had a right to avoid his promise (27). Duress, like infancy makes the contract voidable, not void, and so could not be proven under non est factum. Fraud likewise, except where the defendant was deceived into thinking he was executing a different instrument, makes the contract voidable only.

§ 26. **Same (continued).** But some defenses, such as usury and illegality (28), that make the contract absolutely void, were not allowed under non est factum. This is explained historically. Originally, these were not legal defenses to the instrument at all but could be availed of only in equity. When they finally came to be allowed

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(26) Anonymous, 12 Mod. 609.

(27) Gylbert v. Fletcher, Cro. Car. 179.

(28) Harmer v. Wright, 2 Starkie 35. A case of debt on a specialty, but the scope of non est factum in that form of action and in covenant is the same.

at law, it was not unnatural that they should be required to be pleaded in confession and avoidance. Non est factum, then, denied the actual execution of the instrument, and also permitted proof that the instrument was absolutely void on account of either coverture or insanity, the only defenses showing it void which were anciently available at law at all.

The breach and the performance of express precedent or concurrent conditions, then, were facts which were not put in issue by non est factum (29), but could be put in issue by traverses. These would be put in issue by simple separate traverses of the particular facts which the defendant wished to deny. All defenses which did not admit of proof under non est factum, and which could not be made by traversing some fact in the declaration, of course would have to be pleaded in confession and avoidance (30). And, if the defendant put in a plea in confession and avoidance, the plaintiff might need to make a replication, traversing, or confessing and avoiding the plea. But the pleadings beyond the plea were in general the same in all the forms of action, and followed the ordinary logical rules of pleading.

§ 27. **Debt on a specialty.** Debt on a specialty may be next noticed. It lay to recover a definite sum due by a contract under seal. The allegations essential to be made in the declaration were the same as in covenant, except that, by a curious process of reasoning, the courts raised a doubt as to whether the breach need be alleged (31).

(29) Gardner v. Gardner, 10 Johns. 46.
(30) Russell v. Fabyan, 28 N. H. 543.
(31) Goodchild v. Pledge, 1 M. & W. 363.

The argument was that the mere allegation that the defendant owed the debt implied that he had not paid it, and so made any further allegation of non-payment (the breach) unnecessary. Of course, all the *facts* showing a debt might be true, and yet the defendant might have paid it when due, and so the *facts* showing a debt did not show a breach by non-payment. But here again, facts and conclusions of law were confused. A breach was commonly alleged, so that the question whether it had to be was never thoroughly settled. *Non est factum* is the general issue in debt on a specialty and has exactly the same scope as non est factum in covenant, which has just been explained (32). In fact, all the pleadings in debt on a specialty were the same as in covenant, with the exception of the question whether the plaintiff in debt need allege a breach. So for the details, the reader is referred back to the discussion of the pleadings in covenant (§§ 25-26).

§ 28. **Debt on simple contract.** We may next consider debt on simple contract. Here the necessary allegations are: (1) that the defendant owes the plaintiff some stated amount, as the price of some thing or service given for the defendant (33); and (2) that the defendant has not paid. The second allegation is obviously the breach. There is the same doubt here, as in debt on a specialty, whether this allegation is essential (34). It is commonly made. It was thought that the allegation that the de-

(32) Yates v. Bowen, 2 Strange 1104; Edwards v. Brown, 1 Tyrwhitt, 182.

(33) Emery v. Fell, 2 T. R. 28.

(34) Gebhart v. Francis, 32 Pa. St. 78.

fendant owes the plaintiff implies that all conditions to the defendant's liability have been performed, and so that any express averment of that was unnecessary. Of course, the allegation that the defendant *owes* is a conclusion of law. But that objection was disregarded and the allegation was permitted. The general issue in this form of debt is *nil debet* (he owes nothing). Obviously this is a denial of the first allegation. And it is equally plain that, if taken literally, almost all defenses could be proven under it, for almost all good defenses will show that the defendant owes nothing. Of course, no such allegation of law should have been allowed in the declaration; and no such general plea denying that allegation of law should have been allowed. But they were allowed.

§ 29. **Same: Affirmative defenses.** Such being the scope of the general issue in debt on simple contract, if taken literally, what if any defenses would be left to be pleaded in confession and avoidance? All defenses showing that there is now no debt would come under the general issue. Thus payment, release, accord and satisfaction, coverture, infancy, illegality, duress, and many others would be provable under the general issue. The only defenses, strictly so called, which would not be included would be the statute of limitations, the statute of frauds, and a discharge in insolvency or bankruptcy. At least these are the only prominent ones. But do these not show that there is no existing debt? The law, rightly or wrongly, does not consider these defenses as destroying the debt, but simply as creating a defense to it. According to the legal theory of these defenses, the debt

still remains, but a defense is raised to its enforcement. Therefore, as has been stated elsewhere, the defense of the statute of limitations may be waived. See Contracts, §§ 59-60, in Volume I. If the debt were absolutely gone when the statute has run, the statute could not be waived, for that would be creating a new debt without any consideration. Again, with regard to the statute of frauds, the rule is that in suits with persons who are not parties to the contract the statute is no defense. But, if the contract were destroyed by the statute, surely anyone could show that fact. The statute does not destroy the contract and the debt arising out of it, but simply creates a defense personal to the parties to the contract. Discharge by insolvency or bankruptcy proceedings is considered by the law in the same way as discharge by the statute of limitations. So all these defenses, then, since they do not establish that no debt exists, would have to be pleaded in confession and avoidance, on principle.

§ 30. **Same: Result of the decisions.** But the cases settling the scope of the general issue in debt became confused, and the outcome is a result which is totally inexplicable by any process of reasoning, but which is the settled rule. It is this: All defenses, whether negative or affirmative, are provable under the general issue of nil debet (35), except tender (36), set-off (36), denial of a landlord's title in an action for rent (36), former recovery by another person in an action for a statutory

(35) Gillespie v. Darwin, 6 Heisk (Tenn.) 21.
(36) Stephen on Pleading (Tyler's ed.) 173, note.

penalty (37), and the statute of limitations (38). Thus, a discharge in bankruptcy or insolvency, or the statute of frauds, could be relied on by the defendant, although his only plea was nil debet, and although, as just explained, these defenses do not show that the defendant owes nothing. On the other hand, the denial of the title of one's landlord shows that there is no debt for rent. Also, former recovery by another party of a statutory penalty shows that the defendant owes this plaintiff nothing by way of such penalty. Yet, these two defenses could not be proven under nil debet. (Of course, by denial of the landlord's title is meant denial that the landlord had title when the rent accrued, and not that he had title when he made the lease. Subject to certain limitations, that cannot be denied by a tenant.)

§ 31. **Same: Statute of limitations. Setoff.** With regard to the statute of limitations, that was properly required to be in confession and avoidance, since it did not destroy the debt, and so the defendant could not truthfully say nil debet, even though the statute of limitations had run. The so-called defenses of tender and set-off are not really defenses at all. Tender means that the defendant offered to pay the plaintiff the amount the plaintiff is entitled to. But the plaintiff, not having been paid, though through his own refusal to take the money, may still recover it, and so tender is not a defense. But it does have this effect, that the plaintiff cannot recover any interest accruing after the date of the tender, nor

(37) Bredon v. Harman, 2 Strange, 701.
(38) Chapple v. Durston, 1 Cr. & J. (Eng.) 1.

can he recover any costs of the suit in which he recovers. In order to gain these advantages, the defendant must set up the tender by a plea. A set-off is not a defense, but a cross-action by the defendant against the plaintiff. The plaintiff may be suing the defendant for $150, the price of a horse. A set-off would exist if the plaintiff happened to owe the defendant $18 for groceries bought by the plaintiff at the defendant's store. Originally, this set-off could not be used at all., except by a separate suit to recover it. By statutes this has generally been changed (39). Now, the defendant may, by pleading the cross-action, have the two actions tried together. The plaintiff will recover his $150. The defendant will recover his $18. The two recoveries will be set-off against each other, with the result that the plaintiff obtains a verdict and judgment for only $132. It was not unnatural that this so-called defense, since it arose later and by statute, should have to be specifically pleaded in confession and avoidance. It should be added that the statutes, permitting set-offs to be used, generally provided that a set-off could be used without a plea in confession and avoidance, if the defendant gave the plaintiff notice that he would rely on a set-off. This notice, however, was practically the equivalent of a plea in confession and avoidance. So much for the pleadings in debt on simple contract. All defenses could be proven under nil debet, except those above stated as exceptions, which had to be pleaded in confession and avoidance.

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(39) Stat. 2 Geo. II. ch. 22 is the most prominent statute.

§ 32. **Special assumpsit.** The form of action called special assumpsit requires the following allegations in the declaration in order to make out a prima facie case: (a) the promise of the defendant (40); (b) the consideration for that promise (41); (c) the performance by the plaintiff of conditions precedent (42); (d) the readiness and offer by the plaintiff to perform conditions concurrent (43); (e) the breach by the defendant (44). There are cases where these are varied somewhat, but the exceptions are too detailed for our present treatment. The general issue in assumpsit is *non assumpsit*. It reads: "And the said defendant, by ..... his attorney, ... says that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him, ..." Some formal parts are omitted in this quotation. Obviously, the natural meaning and no doubt the original scope of this plea was to put in issue only the promise of the defendant, which is the first of the necessary allegations as above stated. But, by a development similar to that in ejectment, its scope was greatly extended until finally it came to be treated as a *denial that the plaintiff now has a cause of action*. Tender and set-off clearly failed to establish such a denial, and so had to be pleaded in confession and avoidance. The statute of limitations, discharge in bankruptcy, and discharge in insolvency, for

(40) Avery v. Tyringham, 3 Mass. 160, 176.
(41) Murdock v. Caldwell, 8 Allen, 309.
(42) Henderson v. Wheaton, 139 Ill. 581.
(43) Palmer v. Sawyer, 114 Mass. 1.
(44) Blakey v. Dixon, 2 B. & P. 321.

reasons already explained (§ 29), did not show that there was no cause of action, but merely that there was a defense to the cause of action personal to the defendant. So they had to be pleaded in confession and avoidance. All other defenses were admissible under the general issue (45).

§ 33. **Same: Pleading statute of frauds.** With regard to the statute of frauds this result seems erroneous. That the contract did not comply with that statute does not show that there is no cause of action, for the statute of frauds does not make a contract void but only unenforceable (§ 29). Third parties generally cannot rely on the statute, and yet, if the contract was void, surely anybody not estopped could assert the fact. The contract being valid, though unenforceable between the parties, a cause of action exists which is subject to a defense personal to the defendant. This makes the case in effect the same as one where the cause of action is subject to the defense of the statute of limitations, or to a discharge in bankruptcy or insolvency.

The reasoning on which the courts have held that the statute of frauds is available under non assumpsit is that non assumpsit denies the contract, for there could be no present cause of action without a contract; and compels the plaintiff to prove a contract; and that, when the plaintiff offers evidence of an oral contract, the defendant may have the evidence excluded on the ground of the statute of frauds. But this is erroneous. The statute of frauds is not a rule of evidence. Rules of evidence ex-

(45) Osgood v. Spencer, 2 Harris & Gill, 133.

clude certain dangerous evidence of a provable fact. But if the statute of frauds applies, the contract is unenforceable between the parties, and so immaterial in that suit and therefore not provable. In a case where a third party is involved, the evidence of an oral contract is perfectly admissible, and yet it is no better or worse evidence there. The difference is that in such a case the contract may be relied on and so may be proved. The statute of frauds, being a defense and not a rule of evidence, cannot be relied on without proper pleading. As we have seen above (§ 29), its effects is such to make it pleadable only in confession and avoidance. To allow it to be relied on without pleading is anomalous and erroneous. But the law is so settled (46).

§ 34. **Same: Pleading defenses which show contract voidable only.** Defenses such as infancy, duress, and fraud, which make the contract voidable only and not void, raise an interesting question. Do such defenses show that there is no cause of action, or not? They are, by the law, admissible under non assumpsit as already stated. But, if they show not a void, but merely a voidable cause of action, the law is illogical in so admitting them, for they would not show that there is no present cause of action. To meet this position it may be argued that, when a voidable contract is avoided, it becomes void; that a plea of infancy, duress, or fraud is an avoiding of the contract; that, therefore, at the moment the plea is filed, the contract is void; and so the plea shows that there is no cause of action. The law is that the de-

(46) Maggs v. Ames, 4 Bing. 470.

fense must exist when the plea is filed. But this seems substantially complied with, if the very filing of the plea makes the defense complete. Of course, contracts may be avoided by acts of avoidance before any suit is begun. In such an event, the contract clearly would be void when the plea was filed, and the defense would come under non assumpsit. It cannot be assumed that in all cases there was such a prior avoidance; but the argument above still remains, that the filing of the plea makes the contract void. There is, however, this possible reply to the argument, namely: that while a plea of infancy avoids the contract, because it shows an intention to avoid, a plea of non assumpsit does not show such an intention, since the defendant may be intending to rely on some other one or more of the defenses provable under that plea. If this last position were sustained, then the avoidance would not take place until the defendant offered evidence of the infancy at the trial. In that event, the contract would not be void at the time that the plea of non assumpsit was put in, and the law on the subject would be wrong. This question has been discussed to this length, to show on what delicate lines of reasoning pleading questions have to be settled.

§ 35. **General assumpsit: Its origin.** General assumpsit is a combination of debt and special assumpsit. It was originated to enable the plaintiff to avoid suing in debt. The plaintiff wished to avoid suing in debt, because in that form of action "wager of law" was allowed. "Wager of law" was a proceeding by which the defendant, as a defense to the suit, took oath that he did not owe

the debt, and got eleven other men to take oath that they believed him (47). This proved to be an easy method of defense. Accordingly, debt became unpopular. Instead of passing a statute correcting the evil, as is the modern fashion, the courts corrected it by a resort to fictions, the same method that is exemplified so completely in ejectment. The creation of this new form of action was not accomplished in a day, and it took place by stages. It must first be noticed that special assumpsit itself was a new action, to be allowed only when none of the old actions would suffice, just as equitable relief is only available when legal remedies are inadequate. So the first position of the courts was that assumpsit would not lie if debt could be used (48). As has been stated, debt will lie on a simple contract, whenever the plaintiff is suing for the price of some thing or some service done for the defendant. In all such cases, then, the first position of the courts drove the plaintiff to an action of debt, and the probability of being met by the defense of wager of law which nothing would defeat. The next step in the development occurred when the courts decided that, if the plaintiff could get the defendant to make a new promise to pay the debt, then he might bring assumpsit on this new promise as a new contract. The consideration for this new promise was said to be the old debt. Today, in many jurisdictions, such a past consideration would be held bad. But, at that time, ideas of consideration were

(47) The last case of wager of law was King v. Williams, 2 B. & C. 538 (1824). It was shortly afterwards abolished by statute.

(48) Maylard v. Kester, Moore, 711.

not very clearly defined. This new position did not exactly overthrow the first position. For the price of the chattel or labor furnished the defendant, only debt would lie. But, for the breach of the new promise to pay the debt, assumpsit might be brought. The third and final step was this: the courts held that they would imply a new promise to pay the debt (49). This was out and out legislation, and was based in part on grounds of fairness. The idea clearly was to enable the plaintiff to bring assumpsit instead of debt, and so to avoid wager of law. This kind of action of assumpsit in which the plaintiff sues on a debt, coupled with a new fictitious promise to pay the debt, is called general assumpsit to distinguish it from the ordinary suit on a real contract, which is called special assumpsit.

§ 36. **Same: Pleadings.** The declaration in general assumpsit is just what one would expect: (a) a statement of a debt (50); (b) an allegation of a new promise to pay that debt (51); and (c) an assertion of a breach in nonpayment (52). The debt was alleged in the same manner as in an action of debt. The statement would be that the defendant owes the plaintiff one hundred dollars for goods sold, services performed, money lent, or the like, to the defendant by the plaintiff. Obviously this was very general and an allegation of law; but it was allowed both in debt and in general assumpsit. The allegation of the promise, before it became a pure fiction, had to be

(49) Slade's Case, 4 Coke, 92 b.
(50) Hibbert v. Courthope, Carthew, 277.
(51) Lea v. Welch, 2 Ld. Ray. 1516.
(52) Rider v. Robbins, 13 Mass. 284.

proved. But, when the third step explained above had been taken, no proof of the second allegation was required. Nevertheless the allegation was required. It was the distinguishing mark of a declaration in general assumpsit, by which it could be told from an action in debt (53). The allegation of the breach is self-explanatory. A comparison of these allegations in general assumpsit with those of special assumpsit, already stated, will show how diverse the two forms of action are.

The general issue in general assumpsit was precisely the same as in special assumpsit—non assumpsit—and finally came to have exactly the same scope (54). Probably it always had a very broad scope, because by its terms it denies the promise. This means that it denies the second allegation above. As we have seen that was a fictitious promise implied by law. The law clearly would not imply a promise unless there was a debt. Therefore, the debt would be denied by non assumpsit. This would admit proof then of all defenses showing that there never was an actionable debt. Obviously, this is an extremely broad general issue. No doubt the great scope of non assumpsit in general assumpsit reacted upon non assumpsit in special assumpsit, and aided its expansion, which has already been explained. At all events non assumpsit came to have exactly the same scope, whether used in special or general assumpsit. The exact limits

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(53) McGinnity v. Laguerenne, 10 Ill. 101.

(54) Thus, defenses showing there is no present cause of action come under non assumpsit. Fits v. Freestone, 1 Mod. 210. But defenses showing a personal defense merely, like bankruptcy, have to be pleaded in confession and avoidance. Gowland v. Warren, 1 Camp. 363

are fully stated under special assumpsit, above. The other pleadings in general assumpsit present nothing irregular.

Section 3. Tort Actions

§ 37. In general: Trover and replevin. We now may examine the forms of action by which torts are redressed. We will confine our attention to the four most commonly used: trepass, case, trover, and replevin. It will be simplest to consider the use of trover and replevin first. Trover lies for a conversion of personal property. It lies in no other case (55). What is a conversion has been discussed in the article on Torts, Chapter IV, of this work. Replevin is the action to recover personal property itself. In trover the plaintiff obtains the value of the goods as damages for the conversion (56). In replevin he obtains the goods themselves. But replevin may lie where there has been no technical conversion. In its modern form it is maintainable whenever the defendant wrongfully took or wrongfully detains the plaintiff's goods

§ 38. Same: Trespass and case. Direct and indirect injuries. The limits of trespass and case are not so easily defined. Trespass will lie for injuries to personal property, real property, or to one's person itself. It may also lie for injuries to members of one's family; but that use of it is uncommon. It will not lie for torts to intangible rights (57), such as slander and libel, interference with contract, or malicious prosecution; for such torts case

(55) Davis v. Hurt, 114 Ala. 146.
(56) Evans v. Kymer, 1 B. & Ad. 528.
(57) Wetmore v. Robinson, 2 Conn. 529.

must be brought. And even as to torts to rights in tangible things, trespass is not always the remedy. The injury to the tangible thing must be direct, and must be a violation of possession. If it is indirect or not a violation of possession, case must be brought. To understand these statements, we must distinguish between direct and indirect injury, and we must determine what is a violation of possession. Direct injury means that there is no time, between the defendant's act and the plaintiff's injury, when everything comes to a standstill. If such a stopping does occur, the injury is indirect. Thus, if the defendant drove his horse so carelessly that the horse ran away, threw the defendant out of the buggy, and ran over the plaintiff, that is a direct injury. There is no cessation of force or movement at any time. Trespass would lie (58). But if the horse ran away through the carelessness of the defendant, threw the defendant out of the buggy, proceeded down the street and stopped; and then the plaintiff, driving down the street, should run into the buggy, the night being dark, and thus receive an injury, trespass would not lie, as the injury is indirect (59). There was a termination of the original motion caused by the defendant's wrong. The injury is still due to that wrong, but only indirectly. Such is the distinction. Its applications are manifold.

§ 39. **Trespass and case: Violation of possession.** By a violation of possession is meant that the defendant must injure some person or thing, not in his own possession at

(58) Leame v. Bray, 3 East, 593.

(59) Knight v. Dunbar, 83 Me. 359, is an analogous case.

the time. Thus, if the defendant, being in possession of my horse, whether rightly or wrongly is immaterial, should do damage to it, trepass would not lie (60). If, on the other hand, I, or some third party, be possessed of the horse at the time of the injury by the defendant, then, so far as this requirement is concerned, trepass would lie (61). If I am possessed of a farm and the defendant enter it improperly, trepass will lie. But if, after he had entered and put me off the farm and taken possession himself, he cuts down trees or does other injury to it, trepass will not lie for this last wrong, because, at the time of it, he himself was possessed of the farm (62). He, therefore, could not be violating any other person's possession. He is violating another person's right to possession, but, while that is equally tortious, trespass is not the remedy to recover for such a wrong. Case must be brought. The law treats one as always in possession of his own person, and therefore all injuries to the person are violations of possession. If they are also direct injuries, trespass will lie for them. One limitation on the distinction between trespass and case, as above explained, should be noticed. If the injury is direct but negligent (unintentional), case will lie as well as trespass (63). Ordinarily, case only lies for indirect injuries; but, if the direct injury is negligent, an exception has grown up. There are other more detailed distinctions between trespass and case. But, for the purpose of ob-

(60) Bradley v. Davis, 14 Me. 44.
(61) Pfeiffer v. Grossman, 15 Ill. 53.
(62) Holmes v. Seeley, 19 Wend. 507.
(63) Ogle v. Barnes, 8 T. R. 188.

taining an intelligent notion of the common law system of pleading, their discussion is not essential.

§ 40. **Declaration in trespass.** The declaration in an action of trespass states facts showing the plaintiff's right in the person or thing injured and the act of the defendant which did the injury. In the case of an injury to one's own person, no statement of the right is necessary, as every one has prima facie a right to be free from personal injury. No special fact or facts need be stated to show this prima facie right. The allegation of the right itself would be superfluous as a mere allegation of law. In the case of an injury to a member of one's family, for the beating of a son, for example, the relationship would have to be alleged to show the father's right in the son's person (64). In the case of injuries to realty, the plaintiff must generally allege that he is possessed of the land. Yet this is not really true, because an allegation that the plaintiff owns the land is taken as meaning that he is possessed and is sufficient (65). Obviously, one might be owner without being in possession and vice versa. The pleading rule, that an allegation of ownership is enough, went on the argument that if one is owner he is prima facie presumed to be in possession. This has led to some trouble, as we shall see. A declaration in trepass for injuries to personalty, likewise, alleged ownership (66). At the trial, however, the plaintiff must prove either possession or right to immediate posses-

(64) Gilbert v. Schwenck, 14 M. & W. 488.
(65) Finch v. Alston, 2 St. & P. (Ala.) 83.
(66) Donaghe v. Roudabousb, 4 Munf. (Va.) 251.

sion (67). Here again the allegation of ownership was supposed prima facie to import possession, or right to possession. Notice that, as to realty, possession is essential; while, in the case of personalty, possession or right to possession will suffice.

The allegation of the defendant's act will be in accordance with the act itself, which the plaintiff claims the defendant committed. It may be an assault on the plaintiff, a battery or an imprisonment of his person, an entry upon or other injury to his land, a taking or interference with his goods. It must be stated in accordance with the facts, in order that the plaintiff may be able to prove it at the trial. In the case of trespasses to property, a general description of the property is necessary (68).

§ 41. **Plea and further pleadings in trespass.** The general issue in trespass is *not guilty*. It reads "And the said defendant by ..... his attorney, says that he is not guilty of the said trepasses above laid to his charge, or any part thereof, in manner and form as the said plaintiff hath above complained ....." This general issue was never given such a broad scope as non assumpsit and nil debet came to have. Obviously, its natural meaning would confine it to denying the act or acts of trespass alleged in the declaration to have been done by the defendant. And this it did put in issue (69). To carry it any further was erroneous. But, on reasoning like that explained in connection with ejectment, it

(67) Nachtrieb v. Stoner, 1 Colo. 423.
(68) Randlette v. Judkins, 77 Me. 114.
(69) Herrick v. Manly, 1 Caines, 253.

was held that it would put in issue (deny) also the plaintiff's right in the person or thing injured (70). When it was argued and decided that not guilty would put in issue the plaintiff's right, because there could be no trespass against the plaintiff unless he had a right in the property, it would have been no further deviation from principle to hold that, under not guilty, you could prove that the entry or other trespass was justifiable. But that step was never taken. The law became settled that not guilty denies all the necessary allegations, but them alone. No defenses which are really defenses in confession and avoidance can be proven under it.

§ 42. **Same: Defense of ownership of property.** There was one sort of defense, which was an exception to this rule. It was the defense of ownership of the property. Suppose the plaintiff sues for an entry on land. The defendant wishes to prove that he owns the land and so had a right to enter. This defense is really in confession and avoidance, for all the plaintiff has to prove to make a prima facie case is that he had possession of the land and that the defendant entered. That the defendant had a right to enter, because he owned the land, obviously confesses the plaintiff's case and avoids it. Nevertheless, this defense could be proven under not guilty (71). This anomaly was due to another, already noticed, namely: that, although the plaintiff need prove possession only, yet in fact he commonly alleged that he had title. It was even held in one case that an allegation of

(70) Ebersol v. Trainor, 81 Ill. Ap. 645.
(71) Dickinson v. Mankin, 61 W. Va. 429.

possession would be bad (72). Taking the plaintiff's allegation of title literally, it is plain that the fact that the defendant has title would disprove the plaintiff's title, and so come under not guilty. That is exactly what the courts held about the matter. The result is that in trespass the defendant may, under not guilty, (a) disprove his alleged wrongful act, (b) disprove the plaintiff's possession, and (c) prove that he himself (or somebody under whose authority he was acting) had title. All other defenses must be pleaded in confession and avoidance. The further pleadings are not irregular.

§ 43. **Declaration in case: Great variety of actions.** The great variety of causes of action that may be enforced by an action on the case makes any general statement of the necessary allegations, those essential to be included in the declaration, impossible. We discovered that in trespass the necessary allegations vary, according to whether the suit is for an injury to the person, to personal property, or to realty. In other words they vary with the cause of action sued upon. Precisely the same thing is true of case, with the additional fact that the causes of action upon which Case lies are very numerous. A partial enumeration of them will show this: indirect injuries to the person, to personal property, or to realty; negligent direct injuries to the person, to personal property, or to realty; all injuries to personalty or to realty where the defendant is in possession; all injuries to realty where the plaintiff is not in possession; all injuries to personalty where the plaintiff is not either in

(72) Hite v. Long, 6 Rand. (Va.) 506.

possession or entitled to immediate possession; all injuries by way of slander or libel; all infringements of easements and other incorporeal rights; injuries in the nature of malicious prosecutions; interference with contracts or trade, so far as actionable; often, though not always, injuries by violating statutes, and in this class belong injuries by causing death; injuries classified under the heading of deceit; many injuries by breach of quasi-contract. The necessary allegations vary, according to which one of these numerous causes of action is being sued upon.

§ 44. **Same: Illustrations of actions for negligence.** A statement of the necessary allegations in two or three instances of case will give the reader an idea of the diversity of the allegations requisite for these various causes of action. Probably the most common use of case is to recover for a negligent injury to one's person. A good declaration for this purpose must state: (a) Facts showing that the defendant owed a duty to use care (73). These facts themselves may vary greatly. They may be that the plaintiff was a passenger on the defendant's train; or that the plaintiff was crossing the defendant's street car track in a public highway, and that the defendant was operating a street car thereon; or that the plaintiff was walking on the highway, and the defendant driving an automobile therein; or that the plaintiff was an employee of the defendant working in the defendant's factory (specifying it); or that the plaintiff was in the defendant's store for the purpose of buying groceries.

(73) Ayers v. City of Chicago, 111 Ill. 406.

These are but a few of the countless situations in which the defendant owes the plaintiff a duty to use care toward him. (b) The defendant's wrongful act must be stated (74). This may vary as widely as the facts showing the duty. It may be that the defendant permitted the train to run with a defective brake on the locomotive, whereby the train could not be controlled but ran off the track and injured the plaintiff; or that the defendant ran its street car without sounding a bell or gong to notify pedestrians, whereby the street car ran over the plaintiff; or that the defendant failed to guard certain machinery in his factory, whereby the plaintiff was injured. These again are merely illustrations. (c) The declaration must allege that the defendant did the act "negligently" (75). This may be alleged by the general statement; evidence showing that it was negligent need not be stated. (d) It must be stated that the defendant's act caused the plaintiff's injury (76). This also may be stated in general terms. (e) An allegation that the plaintiff suffered damage is usually essential (77). (f) In many jurisdictions the plaintiff must allege that he was free from all contributory negligence (78).

§ 45. **Same: Other illustrations.** Compare with the declaration outlined above, the necessary allegations in an action for defamation. They are: (a) A statement of the language exactly as used (79). (b) An allegation of

(74) King v. Ry. Co., 1 Penn. (Del.) 452.
(75) Ware v. Gay, 11 Pick. 106.
(76) Strain v. Strain, 14 Ill. 368.
(77) City v. McLean, 133 Ill. 148.
(78) Thompson v. R. R., 57 Mich. 300.
(79) Gendron v. St. Pierre, 72 N. H. 400.

facts showing that the language referred to the plaintiff (80). (c) If the words are not on their face defamatory, an allegation of facts showing them to be so (81). (d) Allegations showing that the language came to the understanding of a third party or parties (80). This is the publication. (e) If the language was oral, and is not actionable per se, an allegation that damage resulted to the plaintiff through the conduct of those who heard the defamation (82). These allegations are obviously very different from those in an action for negligence

The necessary averments in an action for deceit are again totally different. The declaration must contain: (a) a statement of the representation made by the defendant; (b) an allegation of its falsity; (c) that the defendant knew it was false when he made it; (d) that the plaintiff acted in reliance on the representation; (e) that he was damaged (83).

More illustrations of declarations in case are unnecessary. They are as variable as the causes of action. To be able to draw a good declaration in case one must study the necessary allegations in each cause of action separately, a task obviously beyond the limits of this encyclopedia.

§ 46. **Plea and further pleadings in case.** The general issue in case is *not guilty*. It differs very slightly in form from the general issue in trespass. The difference is that in case the defendant says he is not guilty "of the

(80) Duvivier v. French, 104 Fed. 278.
(81) Gerald v. Inter Ocean, 90 Ill. Ap. 205.
(82) Beach v. Ranney, 2 Hill (N. Y.) 309.
(83) Byard v. Holmes, 34 N. J. L. 296.

premises," while in trespass, as we saw (§ 41), he says he is not guilty "of the trespasses." Otherwise they are worded exactly alike. But, in effect or scope of the defences provable under them, they are very different. The law is that in case every defense is admissible under the general issue except: (a) truth, as a defense to an action for defamation (84); and (b) the statute of limitations in all actions (85). There were one or two other exceptions of little if any practical importance today. Thus, in case, as in debt on simple contract or assumpsit, the general issue was commonly the only plea filed, and, being a traverse, it would terminate that line of pleading. However, other pleas might be used in certain cases, and replications and further pleadings were possible. When they occurred they followed the regular order of pleadings, already explained, and need no further comment.

§ 47. **Action of trover.** This action lies for a conversion of personal property. The necessary allegations are always the same, except in details. They include: (a) An allegation that the plaintiff owns the goods. This is a sufficient allegation of the plaintiff's right. Yet here, as in trespass for injuries to personalty, the plaintiff must have either possession or right to possession, and property or ownership is really immaterial, except that, if the defendant is the owner or acts under the owner, that may be a defense. The plaintiff makes out a prima facie case at the trial, by proving either possession or right to pos-

(84) Petrie v. Rose, 5 Watts & S. (Pa.) 364.
(85) Kidder v. Jennison, 21 Vt. 108.

session alone. Proof of property, without proving either possession or right to possession, would not suffice (86). (b) A general description of the property is essential. This plainly would vary with each case. (c) An allegation that the defendant converted the property (87). This general form of allegation is sufficient, though an allegation of the facts showing the conversion will also suffice. If the latter course is taken, the facts stated will vary with the nature of the conversion in each particular case. In one case it may be a sale, in another a destruction, and in another a use of the goods.

The general issue in trover is identical in form with that in case (§ 46). In effect it is also practically the same. The only defense which certainly has to be pleaded in confession and avoidance, that is, that will not be provable under not guilty, is the statute of limitations (88). We saw that that was also the rule in case. In fact, historically, trover is an off-shoot from case. It is not surprising, therefore, that the pleading in the two forms of action should be very similar. The further pleadings in trover, when they occur, present no irregularities.

§ 48. **Action of replevin.** The peculiar thing about the action of replevin is that the plaintiff regularly obtains relief before he wins his case. The object of the proceeding is to recover a specific chattel, as a horse, a wagon, or a coat. Normally, the plaintiff would have to plead and prove that he was entitled to the chattel, and the defend-

(86) Gordon v. Harper, 7 Durnford & East, 9.
(87) Royce & Co. v. Oakes, 20 R. I. 252.
(88) Pemberton v. Smith, 3 Head (Tenn.) 18.

ant would be given an opportunity to present his defenses, before the plaintiff would obtain the object of his suit. But when the plaintiff is attempting to obtain not money, but a specific chattel, there is danger that, during the time which must elapse between the beginning of the suit and the judgment, the defendant will dispose of the chattel in such a way as to make it impossible for the sheriff or other court officer, when he comes to take it on execution, to obtain it. For this reason, the plaintiff was authorized, before the regular commencement of the action, to make a complaint to the sheriff, setting forth the wrongful taking of the chattel, and to accompany this by a bond with proper sureties, binding him to prosecute an action of replevin against the defendant, and to return the chattel to the defendant, in case the court, as a result of the action, should order such a return. Upon the filing of these papers properly executed, the sheriff, or other officer of the court, takes the chattel in question from the defendant and delivers it to the plaintiff. Thus all danger that the defendant will put the chattel beyond the reach of process is avoided. These proceedings have been modified by statutes in modern times. It is common to require the plaintiff to file an affidavit stating the facts entitling him to the chattel. It is not uncommon to permit the defendant to give a bound with sureties, binding him to turn over the chattel in case judgment in the action goes against him, and, upon giving this bond, to retain the chattel. If the plaintiff obtains the chattel, his action is merely to recover damages suffered by the defendant's detention of it. If the sheriff is unable to get

the chattel at the outset, or if the defendant gives a bond and retains it, the judgment will order a delivery of the chattel and damages for its detention, or, if a delivery is impossible, then for the value of the chattel and damages for its detention (89).

§ 49. **Same: Declaration.** The declaration in replevin was not affected by the preliminary proceedings above explained. But, as we shall see, the defendant's pleadings were modified considerably. The following are the allegations necessary to be included in the declaration: (a) That the plaintiff is the owner of certain goods (90). It will be noticed that the plaintiff alleges ownership. But here, as in trespass, trover, and elsewhere, he need not prove ownership. Further, proof of ownership would not suffice. He must prove either possession or right to immediate possesion (94). (b) A general description of the goods (91). (c) That the defendant took or detained the goods (92). In some jurisdictions the old rule, that replevin will not lie unless the defendant *wrongfully took* the goods, still obtains. (d) The place of taking (93). The reason for considering that the place of taking was material will be hereafter explained. The other necessary allegations are self-explanatory.

§ 50. **Same: Defendant's pleadings.** In replevin, as in other actions, there is a general issue. It is called *non*

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(89) Beuesch v. Weil, 69 Md. 276.
(90) Pattison v. Adams, 7 Hill, 126.
(91) Stevens v. Osman, 1 Mich. 92.
(92) Badger v. Phinney, 15 Mass. 359.
(93) Atkinson v. Holcomb, 4 Cowen (N. Y.) 45.
(94) Collins v. Evans, 15 Pick. (Mass.) 63.

cepit (he took not). In those jurisdictions where replevin lies against a defendant who took rightfully but detained wrongfully, the general issue may be *non detinet* (he detains not). We shall confine our further discussion to replevin for a taking. The general issue of non cepit puts in issue the taking (95) and the place of taking (96), and these alone. The plaintiff's right in the goods is denied by an ordinary traverse (97). If the plaintiff's right is traversed, he must prove possession or right to possession of goods of the description alleged. If the defendant pleads non cepit and thus denies the taking, the plaintiff must prove that the defendant took goods of the description alleged, in the place alleged. Thus, here and everywhere, the description would not be denied directly but only incidentally. In general, all affirmative defenses must be pleaded in confession and avoidance.

§ 51. **Same: Comment thereon.** This would seem to be sound pleading on principle. Non cepit was not extended beyond its proper scope. According to its natural meaning it denies the taking, and such is its legal effect. True, it denies the taking of described goods and in a given place. But these are necessary ingredients of the taking. One cannot take in the abstract. He must take some particular thing and in some definite place. The plaintiff's right was properly put in issue by a distinct traverse of it. That right, as has been said, would be either possession or right to possession. So that, if the issue of the plaintiff's right is made, he should win if he proves either

(95) Vose v. Hart, 12 Ill. 378.
(96) Walton v. Kersop, 2 Wilson, 354.
(97) Chandler v. Lincoln, 52 Ill. 74.

possesson or right to possession. If the plaintiff has either of these but the defendant a better right, that ought to be pleaded in confession and avoidance. There is here, however, a slight deviation from principle, excusable perhaps on grounds of convenience. It is this: Under a traverse of the plaintiff's right, all questions as to the right in the goods are in issue. Thus, suppose the plaintiff has possession, but the defendant is the owner with the right to possession. The defendant takes the goods as he lawfully may. The plaintiff sues in replevin. On strict principle, on a traverse of the plaintiff's right he should win, as he had possession which is sufficient to make out a prima facie right in him. The defendant should not be allowed to prove his title and right to possession, without pleading it in confession and avoidance. But the law allows him to prove it under the traverse (98). No doubt the excuse is that this makes for simplicity. The defendant, by a traverse of the plaintiff's right, puts in issue all questions as to the rights of the parties in the chattel. The trouble with this excuse is that it leads to illogical pleading, and that it has not been applied in all cases in other forms of action where the same question arises. Deviations from logical pleading are usually unfortunate, as lawyers and through them their clients are thus led astray. The cases establishing the exception may be difficult to find. The lawyer may not find them. He then pleads in accordance with what sound reasoning would demand. When, later, he is met by the illogical exception and is put to expense and delay,

(98) Constantine v. Foster, 57 Ill. 36.

an injustice arises. But, except for this one deviation from correct pleading, the pleadings in replevin, so far as we have covered them, are logical and correct.

§ 52. **Same: Avowry and cognizance.** The idea that underlies these pleas of the defendant is that they are really new declarations made by the defendant—cross declarations so to speak. The plaintiff has obtained the goods by the preliminary proceedings, already described. The defendant wishes them back. To obtain an order for a redelivery of the goods to him he must seek such an order. If he merely defends the action and prevents the plaintiff from recovering damages, that will not give him the goods back. To accomplish this he needs a cross declaration setting forth his right to have them back and demanding their return (99). In the *avowry,* the defendant demands them back, because he himself is entitled to them in some way, as owner perhaps, or possibly as having a lien on them, or other qualified right in them. In the *cognizance,* the defendant asserts such a right in a third party, and alleges that the defendant acted as agent or servant of such third party. This is the only difference between the two pleas, or rather cross declarations.

There is one class of cases where the defendant can have a return, without a technical avowry or cognizance. It is when the defendant sets up title in himself or a third party under whom he acted. In such a case all right in the plaintiff being absent the court will order a return

(99) People v. Niagara, 4 Wend. (N. Y.) 217.

(100). But here some courts require that the plea shall demand a return, which makes it substantially an avowry or cognizance. And it must be remembered that this class of cases is confined to where the defendant alleges and proves *full ownership* in himself or the third party (101). If he or the third party has but a *qualified interest* which would entitle them to a return of the goods, he must use a technical avowry or cognizance.

§ 53. **Same: Further pleadings.** But a word further need be said. If the defendant used any ordinary plea, non cepit, a traverse of the plaintiff's right, or an ordinary plea in confession and avoidance, the plaintiff would plead in the regular way. To non cepit or the traverse he could say nothing, as they created issues which must now be tried. To the plea in confession and avoidance he could demur, traverse, or confess and avoid. Such a traverse, or confession and avoidance, would be called a replication as usual. But, if the defendant used an avowry or cognizance, then the next pleading on the part of the plaintiff was called a plea instead of a replication. This was due to the fact that the avowry or cognizance was in effect a cross declaration (102). It seemed appropriate then to call the pleading to it a plea. The next pleading by the defendant would then be the replication, and so on. This change of names did not, however, lead to any changes in the substance of these various pleadings.

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(100) Butcher v. Porter, 1 Salk. 94.
(101) Vose v. Hart, 12 Ill. 378.
(102) Wilson v. Gray, 8 Watts (Pa.) 25.

CHAPTER III.

DEFECTS IN PLEADING.

Section 1. Classes of Defects.

§ 54. Three classes of defects: Substance, form, dilatory. All defects that may occur in pleading may be divided into: (a) Defects in substance. (b) Defects in form. (c) Dilatory defects.

A defect in substance occurs when a pleading fails to state enough facts to constitute a prima facie cause of action, or a prima facie defense, reply, or the like.

A defect in form occurs when, though enough facts are stated, they are not stated in such a manner as the law requires (1). The law may make formal requirements to secure simplicity, clearness, brevity, uniformity, or similar qualities. The law has undertaken to secure these qualities by making specific requirements as to form, rather than by commanding brevity, for example, and leaving it to the court in each case to decide whether the pleading is reasonably brief or not. Defects in form then consists in errors in the manner of stating the material facts. This will become clearer as we proceed.

Dilatory defects are defects which appear in the pleading, but which really exist in the proceedings outside of

(1) Heard v. Baskerville, Hobart, 232.

the pleadings. Thus, suppose the action is for a trespass upon land, brought in a different state from that in which the land lies, and that this appears in the declaration, as it naturally would, for in trespass the location of the land is material to be alleged. That is a dilatory defect. It is a defect, for the courts of one state have no jurisdiction over trespasses committed in another state (2). It is not a defect in form, for the method of alleging the facts is not defective. It is not a defect in substance, because all the allegations necessary to constitute a cause of action are present. There is a good cause of action. The trouble is the action is begun in the wrong court. That defect, while apparent in the declaration, is not confined to it, but exists totally independent of the pleadings in the other proceedings in the case The entire proceedings are in the wrong court. There is a good cause of action stated, upon which a recovery may be had, and that cause of action is stated with all due form, but the proceedings are in the wrong court and so the action is defective. We can see the reason for calling such defects dilatory defects: they do not bar the suit for all time, but merely delay it until it can be properly instituted. In the supposititious case above, that means until it can be brought in the right court.

Section 2. Defects in Substance.

§ 55. Construction of pleadings. In the discussion of defects in substance, we are to consider various common mistakes which lead to defects in substance, and certain

(2) Doulson v. Matthews, 4 D. & E. 503.

cases where a pleading which appears to be defective in substance is in fact good. At the outset we must notice a principle that very often has to be applied. It is that a pleading is construed against the pleader in all cases of reasonable doubt (3). The reason given for this apparently harsh rule is that the pleader, the party who filed the pleading and who therefore either drew it or had it drawn, would state his case just as strongly as possible, being led thereto by self-interest; that, therefore, it may be assumed that any fact which he did not clearly state did not really exist, and should not be considered as stated. There is something to be said on the other hand. Even lawyers have not a perfect command of language, and thus statements which are not clear creep in. Again, what appears to the writer to be explicit, because of his perfect familiarity with the facts, may not appear so to the reader who does not know the facts. However, the rule is well settled, in comomn law pleading, that all pleadings are to be construed most strongly against the pleader.

§ 56. **Inconsistency.** Occasionally a pleader may make his pleading bad in substance by inconsistency. No doubt, a plea to a declaration on a contract, which said in effect: "I did not make the contract; I made it through an agent," would be bad in substance. The two statements in the plea are totally repugnant and destroy each other. The defendant has not really denied making it, and he has attempted no other defense. The plea is worthless. Questions of inconsistency usually arise

(3) Thornton v. Adams, 5 M. & S. 38.

where there are two pleas. We shall see later that two or more pleas are generally allowed. Suppose one plea denies the making of the contract, and the other says the cause of action on it is barred by the statute of limitations. Do these pleas destroy each other? One denies the making of the contract: the other confesses and avoids it. But that sort of inconsistency is unobjectionable (4). The confession in a plea in confession and avoidance is a confession only for the purposes of that one plea. It means, "Supposing for the purposes of this plea that the contract was made, and that a cause of action arose on it, that cause of action is barred by the statute of limitations." That obviously is not inconsistent with also denying that the contract was made. If the two defenses could not both be true in fact, then we have such inconsistency as is objectionable. Suppose an action of trespass brought in New Jersey, alleging that the land is located in New Jersey. The defendant pleads: first, that the land is located in New York; second, that the land is located in Pennsylvania. Those two pleas cannot stand. They cannot both be true in fact. But it may be true that the contract the plaintiff alleges was never made, and also that the statutory period of limitation has passed since the time when the defendant did not do the acts, which the contract, if made, would have required. Likewise the defendant may say: "(1) I owe nothing. (2) I paid it." He may have paid the money though owing nothing. Cases of real inconsistency are very rare.

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(4) Peters v. Ulmer, 74 Pa. St. 402.

§ 57. **Allegations of law.** Defects in substance often arise by using allegations of law, so called, instead of allegations of fact. This form of stating the distinction, though the common mode of expression, is not very enlightening. Many allegations which are allowed seem to be allegations of law. An allegation, in an action for negligence, that it was the defendant's duty to use care is bad as an allegation of law. The facts creating the duty must be stated (5). This must be on the ground that the duty is a result which the law attaches to certain facts, and that you must allege the facts rather than the legal result of those facts. Yet, in an action on a contract, the plaintiff may allege that the defendant promised to pay the plaintiff five hundred dollars, the declaration being continued by statements of the consideration, performance, and breach. But is not the promise of the defendant a conclusion of law, drawn from the facts of conversation or correspondence? A study of offer and acceptance in contracts will convince one that much law has to be applied, merely to determine whether the defendant promised in a legal sense. This apparent inconsistency of view about these matters is widespread in all parts of the subject. Some allegations of law are condemned. Other allegations, which seem to be equally allegations of law, are permitted.

§ 58. **Same: Test of validity.** The truth seems to be that the real test is whether the allegation in question is thought by the court sufficiently definite and detailed to give to the other party such a knowledge of the facts re-

(5) Schueler v. Mueller, 193 Ill. 402.

lied on as he is entitled to. Tested by this distinction the cases are more reconcilable. But it is obvious that this gives no definite rule to go by. Each case must be decided by itself. That is, whether a given allegation is sufficiently definite, or whether a more detailed statement is necessary, must be decided by considering whether that allegation gives sufficient notice to the defendant, or whether the trouble and expense of a more detailed statement would be more than outweighed by the gain to the defendant arising out of the fuller knowledge. Thus, an allegation of a promise, stating its terms, is sufficiently explicit according to the law. The law considers that stating all the facts from which the promise legally is derived would not be worth what it would cost in trouble and expense. But the law has considered an allegation of duty so indefinite as not to give the defendant sufficient notice, and therefore requires the facts showing the duty to be stated. Courts have differed as to whether an allegation of fraud is sufficiently definite or not (6). An allegation that the defendant "owes" so much is too indefinite (7). A statement that the plaintiff owns certain land is sufficient (8); he need not state the facts showing his title, that would require his entire abstract of title to be set forth. And so instances might be multiplied. Like German genders, nothing but long study will familiarize one with what the courts hold definite enough, and what they refuse to sanction.

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(6) Hopkins v. Woodward, 75 Ill. 62.
(7) Millard v. Baldwin, 3 Gray, 484.
(8) Hays v. Muir, Smith (Ind.) 90.

§ 59. **Allegations of evidence.** As a sort of companion rule to the one we have been discussing, it is often said that allegations of evidence will not do, but that the ultimate or operative facts must be stated (9). This, however, is not enforced with any great rigidity; and often, if a pleader states a fact and then evidential facts to support it, and the court considers that the evidential facts do not support it, it will hold that they overthrow it. They generally say that the conclusion that the pleader drew from his evidential facts is of no value, if the facts themselves do not support that conclusion. Suppose, for example, that the plaintiff, in a personal injury case, alleges freedom from contributory negligence, and then other circumstances which show that he must have been negligent. Courts have held that the latter statements will destroy his allegation of freedom from contributory negligence, and so will render his declaration bad (10). Yet no doubt the general allegation of freedom from contributory negligence is sufficiently definite, and would have been perfectly sufficient but for the unfortunate statement of the details showing it to be untrue. Probably allegations of evidence also count, in a case where the pleader fails to state the ultimate fact itself, but does state evidence which very clearly proves the ultimate fact. There the courts hold that a setting forth of such strong evidence is equivalent to the allegation of the fact itself. Thus, in an action for a personal injury, the plaintiff must state the defendant's act and that it was

(9) Fidler v. Delavan, 20 Wend. (N. Y.) 57.
(10) Baumler v. Narragansett Co., 23 R. I. 430.

negligent, as we have already seen. But suppose that, instead of stating that it was negligent, the plaintiff merely recites the circumstances, and those circumstances are such as to clearly show that it was negligent. That has been held sufficient (11). Probably the true rule is that, while allegations of evidence generally do not count, yet, if the allegations of evidence amount to very strong proof of a fact, then they are equivalent to an allegation of that fact.

§ 60. **Judicial notice.** Again a pleading may be bad in substance, because an allegation in it, which is necessary, is judicially known to the court to be false. Such knowledge on the part of the court will destroy the allegation and render the pleading defective. Thus, in a leading case, the plaintiff sued in England on some government bonds issued by a South American republic, and alleged, as was necessary, that the South American republic was recognized as a sovereign state by the British government. His pleading was otherwise sufficient. It was demurred to. The court held it bad, because they judicially knew that the South American republic in question was not recognized as a sovereign state by the British government (12). Suppose, in a suit for infringing a patent, the plaintiff should allege that he invented and patented the cotton-gin. It is such common knowledge that Whitney was the inventor of the cotton-gin, that the court would judicially know the plaintiff could not have done it,

(11) Illinois Co. v. Ostrowski, 194 Ill. 376.

(12) Taylor v. Barclay, 2 Sim. (Eng.) 213 (In equity, but the principle is the same).

and the allegation would count for naught (13). Other illustrations might be given. Judicial knowledge may not only make a pleading bad, but it may make a pleading good that would otherwise be defective. Suppose the contract for the sale of a race-horse required it to be delivered to the buyer, at some place in the United States. The seller, in suing for the price of the horse, alleges that he deliverd the horse to the buyer at Quincy, Illinois. Is the declaration bad? No, because the court judicially knows that Quincy, Illinois, is in the United States (14).

What classes of facts the court will take judicial notice of, and what will not be so noticed, are stated in the article on Evidence, § 166, elsewhere in this volume. It may be mentioned, however, that while the court judicially notices the laws of its own state, it does not do the same for the laws of the other states in the Union, or for the laws of foreign countries. If, then, a pleader requires the aid of such a foreign law to sustain his case, he must allege that such is the law of that state or country. Suppose A's husband was killed by a railroad train in Virginia. A, living in Georgia, and the railroad having offices there, sues the railroad in Georgia. A must allege the statute of Virginia, giving a right to recover for a wrongful death caused by the defendant. The Georgia court will not judicially notice the Virginia statutes, and, without such a statute existing in the place where the injury occurred, no action lies for a wrongful death (15).

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(13) Brown v. Piper, 91 U. S. 37.
(14) Martin v. Martin, 51 Me. 366.
(15) O'Reilly v. N. Y. R. R., 16 R. I. 388.

§ 61. Anticipatory allegations. This term is used to designate allegations which have gotten into the pleadings at too early a stage. If an allegation which belongs in a plea, or one which belongs in a replication, gets into a declaration, we have anticipatory allegations. The general principle about anticipatory allegations is that they are merely worthless—of no effect one way or the other. But there is an important exception to this rule. If the plaintiff, in drawing up his declaration, is unwise or unfortunate enough to state facts which amount to a good defense to the cause of action (facts which therefore belong in the plea), he thereby makes his declaration bad in substance and so subject to a demurrer (16). Suppose the plaintiff sues for a personal injury, which occurred during the course of his employment, and so states the facts in his declaration that it appears he was injured by a fellow servant. The declaration would be bad in substance. That the injury was inflicted by a fellow servant is a prima facie defense. A demurrer to the declaration would be sustained. This exception has almost necessarily led to another. Suppose the plaintiff, in the case just discussed, in addition to stating his prima facie case and the prima facie defense that the injury was by a fellow servant, should further state facts showing that the fellow servant in question was a vice-principal, for whom, in the state in which the action was brought, the defendant would be liable. See Agency, § 68, in Volume I. That would cure the declaration. Obviously, the regular course of pleading would require the

(16) Joliet Co. v. Shields, 134 Ill. 209.

defendant to set up the defense that the injury was by a fellow servant, and the plaintiff to reply in a replication that he was a vice-principal. So, in this case, the declaration contains both an anticipatory plea and an anticipatory replication. The anticipatory plea would make it bad, but the anticipatory replication is allowed to cure the defect created by the anticipatory plea (17). That is the only situation where anticipatory pleading has any effect in common law pleading. Thus, if the plaintiff should draw a declaration stating a prima facie cause of action on a contract, and should also allege that the defendant had promised to pay the amount due within six months before suit was brought, we should have a declaration containing an anticipatory replication. The allegation of the new promise would be a replication to a possible plea of the statute of limitations. But it would serve no purpose. If the defendant pleaded the statute of limitations, the plaintiff would have to put in a replication setting up the new promise (18).

§ 62. **Incorporation by reference.** Whether a pleading is good in substance, or not, may be affected by the question whether incorporation by reference has been made or not. Incorporation by reference, as the term implies, means making a reference in a pleading to some statement or statements in some other paper or papers, and thus making such statement or statements a part of the pleading. The general principle of the common law seems to have been that this could not be done (19). The idea

(17) Watters v. De La Matter, 109 Ill. Ap. 334.
(18) Hollis v. Palmer, 2 Bing. N. C. 713.
(19) Estes v. Whipple, 12 Vt. 373.

no doubt was that the pleadings must be complete in themselves. But in many common law jurisdictions there are today statutes which permit incorporation by reference. To accomplish incorporation by reference there must be in the pleading an express reference to the extrinsic matter (20), and no doubt the extrinsic matter must be in writing, and either attached to the pleading or else a part of the record in the case. One may incorporate statements in other pleadings in the case (21). In this connection it may be stated that, in many jurisdictions, there are statutes requiring all papers upon which any pleading is founded, or copies thereof, to be attached to the pleading. The courts have held that thus attaching them, in obedience to the statute, makes them a part of the pleading though they are not incorporated by reference (22). But merely attaching papers to a pleading, independently of any statute, has no effect whatever.

§ 63. **Damage.** In stating the necessary allegations in the various forms of action, usually no mention was made of an allegation of damage. In actions of case, quite commonly damage is an essential allegation. In actions for negligence, slander not actionable per se, and deceit, which we used as illustrations of case, it was included among the essential allegations (23). It seems then that sometimes damage is, sometimes it is not, a necessary allegation. Is there any rule to follow? No. It depends altogether upon the substantive law. If the law of torts

(20) Harrison v. Vreeland, 38 N. J. L. 366.
(21) Loomis v. Swick, 3 Wend. 206.
(22) Navoo v. Ritter, 97 U. S. 389.
(23) See §§ 44, 45.

requires damage to make a case of deceit, as it does, then damage must be alleged in the declaration. If the law of contracts required damage arising from a breach of contract, in order to make a cause of action, then damage would be essential in assumpsit. But in fact such is not the law. A breach of contract is actionable without damage, and therefore damage is not an essential allegation in assumpsit. The only rule, then, is that if the substantive law of the subject makes damage requisite to a cause of action, then the declaration must contain an allegation of damage. Damage is almost invariably alleged. but frequently it is inessential (24).

§ 64. **Same: Special rules.** There are, however, two rules respecting allegations of damage which must be kept in mind. The first is, that, if the damages or any part of them are of a character which the defendant could not reasonably anticipate, then such unusual damage must be stated in the declaration (25). The allegation is not essential to the declaration in the sense that other necessary allegations are. If it is left out the declaration is not demurrable (26). The plaintiff may win at the trial, despite its omission. The only effect of leaving it out is that the plaintiff cannot prove those peculiar damages at the trial, and so cannot recover for them. He may recover for all usual or foreseeable damages (27), and, if there was no foreseeable damage, he may recover nominal damages.

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(24) Havens v. R. R. Co., 28 Conn. 69, 90.
(25) Burton v. Holley, 29 Ala. 318.
(26) McGee v. Bast, 6 J. J. Marshall (Ky.) 453.
(27) Smith v. Thomas, 2 Bing. N. C. 372.

The other rule is that if the plaintiff lays his damage at a certain sum, he cannot recover more (28). Two ideas are at the bottom of this. First, that to give a man more than he asks is probably giving him too much. Second, that the defendant may have failed to procure or produce evidence to reduce the damages, thinking the sum claimed reasonable, and that to allow the plaintiff to recover more would take the defendant by surprise. Probably, if the plaintiff is willing to take his chances with an entirely new trial, he may amend his declaration so as to claim a larger amount. The whole effect of this rule is to cause all wise lawyers to claim much more damage than they can possibly hope to recover.

§ 65. **Partial defenses.** Hitherto we have been discussing defects in substance almost entirely from the standpoint of the declaration. Some of the defects we have discussed might occur in other pleadings. For example, an allegation of law is just as ineffectual in a plea (29), or replication (30), as it is in a declaration. So, also, inconsistency, as we saw, more commonly arises in connection with pleas. We now come to some instances of defects in substance that cannot arise in the declaration. They may arise in a plea or any subsequent pleading. The first one of these is pleading a partial defense to the prior pleading. Suppose the plaintiff brings an action for breach of a contract to sell a horse and cow at a definite price for each. The declaration we will assume

(28) Foreman v. Sawyer, 73 Ill. 484.
(29) Harrison v. Wilson, 2 A. K. Marshall (Ky.) 547.
(30) Holmes v. Electric Ry. Co., 57 N. J. L. 502.

to be good, and to allege total non-performance on the part of the defendant. The defendant pleads that, at the time the contract was made, the cow, unknown to the defendant, was dead. This is no doubt a good plea as to the cow. But, unless the circumstances were unusual enough to make the horse undesirable to the plaintiff unless he could also have the cow, the plea would be no defense at all as to the horse. According to the common law such a plea is totally bad in substance (31). We can see that it is bad as a defense concerning the horse, but why is it bad with regard to the cow? The argument is that it does not destroy the plaintiff's cause of action. Notwithstanding the plea, the plaintiff is entitled to win. A pleading must entirely overthrow the preceding pleading. Pleading has to do with the right to recover, not with the amount of recovery. That is the reason why damage is usually an inessential allegation. The amount of damage is immaterial to the cause of action. Often any damage is immaterial to the cause of action; often some damage is required; but, even when required, the *amount* is immaterial. So a partial defense simply shows that the amount of recovery will be less, but does not destroy the right of recovery. It is therefore bad.

§ 66. **Defenses to several counts.** In the last subsection we were discussing a partial defense to one count. It has been stated that the defendant is allowed to use several pleas. Even before that was allowed, the plaintiff was allowed to use several counts in his declaration. Thus, in one declaration he might have a count for a tres-

(31) Young v. Fentress, 10 Humph. (Tenn.) 151.

pass on lot 1 and another count for a trespass on lot 3. Counts are statements of a simple cause of action. Each separate cause of action must be stated in a separate count. But two separate causes of action could be stated in the same *declaration,* provided they are put in separate counts (32). It is not always easy to state what is a single cause of action. All the breaches of one contract make a single cause of action that can be put in one count (33). So, the failure to deliver the horse and cow, discussed above, was a single cause of action. Trespasses on separate pieces of land, however, would usually be separate causes of action to be stated in separate counts. So, breaches of two distinct contracts would be separate causes of action (34).

§ 67. **Same: Illustrations.** Suppose, then, that we have a declaration containing two counts for separate trespasses on lots 1 and 3. The defendant pleads to both counts that lot 3 is his own freehold. Obviously, he has set up a good defense to the second count, but none at all to the first count. The situation is much the same as in the case of a partial defense to one count. The defendant's plea does not show that the plaintiff has no cause of action. It shows the plaintiff cannot recover as much as he hoped, but that is not the object of a plea. It must show that he cannot recover at all (35). But, it may be asked, suppose the defendant pleads not guilty

(32) Woodward v. Walton, 2 B. & P. (N. R.) 476.

(33) Smith v. R. R., 36 N. H. 458.

(34) Tillotson v. Stipp, 1 Blackf. 76. But in general assumpsit the rule is otherwise. Beardsley v. South Mayd, 14 N. J. L. 534.

(35) Ill. Cent. Co. v. Swift, 213 Ill. 307.

to the first count, and pleads to the second count that he owns lot 3, are both pleas bad because neither one destroys the whole cause of action? No. One may plead to each count separately if he wishes (36), and then each plea must simply overthrow that count entirely. So also, one may plead two different defenses to parts of a single count (37). To return to the sale of the horse and cow. One could plead that the cow was, unknown to the defendant, dead when the contract was made, and that the plaintiff had released the defendant from all obligation to deliver the horse. But these two defenses would have to be put into one plea, since together they overthrow but one count.

§ 68. **Same: (continued).** The same principle applies in other cases. Suppose the plaintiff uses two counts, one of which is bad and the other good in substance, and that the defendant demurs to both counts. His demurrer will be overruled entirely, for it does not destroy the plaintiff's right of recovery (38). True, it shows he cannot recover on the bad count, but it leaves him free to recover on the good count. Not destroying his right to recover entirely, it is bad. But a demurrer to the bad count, and a good plea to the good count, would be sustained.

Again, suppose the defendant to use two pleas. Let us say that to an action for a battery he pleads: first, self-defense; second, the statute of limitations. The plaintiff, as a replication to both pleas, states that he

(36) Patterson v. Wilkinson, 55 Me. 42.
(37) Parker v. Parker, 17 Pick. 236.
(38) Brown v. Castles, 11 Cushing (Mass.) 348.

never attacked the defendant. This is bad. It overthrows the self-defense plea, but leaves the plea of the statute wholly unanswered. Not having overthrown the pleading to which it is pleaded, entirely, it itself is worthless.

§ 69. **Over-narrow denials. Negatives pregnant.** An over-narrow denial is bad because of the same general principle that we have been just discussing. The plaintiff sues the defendant on a policy of insurance, which covers a ship and its cargo. After alleging the promise, consideration, and performance on his part, he asserts that the *ship and cargo* were lost and the defendant has not paid the insurance due. The defendant denies that the *ship and cargo* were lost. The plea is bad in substance. It may be true that the ship *and* cargo were not lost, and yet the ship may have been lost, or the cargo may have been lost. If either was lost, the plaintiff has a cause of action. The plea therefore fails to show that plaintiff has no cause of action and so is bad (39).

Such a plea as is illustrated in the preceding paragraph is often called a negative pregnant. But the leading writers on pleading do not warrant that practice. The true negative pregnant is illustrated by the following plea. To an action for negligently running over the plaintiff, the defendant pleads that he did not run over the plaintiff carelessly. The objection to this plea is that you cannot tell what defense the defendant is relying on. Does he mean to say that he did not run over the plaintiff, or that he was not careless. The courts held that, since

(39) Goram v. Sweeting, 2 Saund. 205.

it could not be told on what defense the defendant was relying, the plea was bad (40).

§ 70. **Departure.** This defect cannot occur before the replication. It consists in changing the ground taken in a preceding pleading of the same party. Suppose the plaintiff sues on a contract requiring him to do certain work for a given price, and to procure an architect's certificate that the work is well done, as a condition precedent to payment. The plaintiff in his declaration alleges that he procured the certificate. The defendant in his plea denies this. The plaintiff replies that the reason he did not procure it was that the defendant colluded with the architect, and induced the architect wrongfully to withhold the certificate. This replication is bad as a departure (41). The ground taken in the declaration, that the certificate was obtained, is abandoned entirely, and a new position taken. That will not do. If a party could do that pleadings might never terminate. Suppose the defendant is sued on a contract. He pleads the statute of limitations. The plaintiff replies a new promise. The defendant then, if allowed to depart, might plead the statute of frauds. The plantiff might reply a part payment. The defendant might then plead infancy. The plaintiff might reply that the articles were necessaries. This might go on almost ad infinitum. Departure is therefore a defect in substance (42).

§ 71. **New assignment.** New assignment is to be contrasted with departure. Departure is a defect. New

(40) Myn v. Cole, Cro. Jac. 87.
(41) Potts v. The Point Pleasant Land Co., 47 N. J. L. 476.
(42) Tarleton v. Wells, 2 N. H. 306.

assignment shows how far the party may go in varying from his preceding position, without causing his pleading to be defective. The rule, in short, is that one may make specific what in a preceding pleading was left general, but that he cannot depart from the general position. An illustration will clear the matter. The action is trespass for an entry on land. The declaration in trespass need only state the county in which the land is. The plaintiff accordingly declares that the defendant entered on the plaintiff's land located in Cook county, Illinois. The defendant pleads that the land described in the declaration is his. Now the land described in the declaration is any piece of property inside of Cook county. Suppose the defendant owns a lot in Chicago. If the plaintiff simply denies the plea, he will lose, for the defendant is able to prove his plea by evidence that he does own a piece of property in Cook county (43). The plaintiff is therefore compelled to specify particularly what piece of property in Cook county he means. This he may do by any sufficient description. The defendant then will plead anew (44). The replication, by which the plaintiff gives a more specific description of the land, is called a new assignment. It is very much like an amendment of the declaration. Indeed, in code pleading, making the declaration more specific is accomplished by an amendment. Of course new assignment is not confined to trespass to land or to any particular actions. Thus, the plaintiff may sue the defendant in general assumpsit for goods sold.

(43) Austin v. Morse, 8 Wend. 476.
(44) Oddiham v. Smith, Cro. Eliz. 580.

The defendant may plead that the goods were not as warranted. The plaintiff may reply, by way of new assignment, describing the goods, and thus showing that the goods the plaintiff is attempting to recover for are different goods from those to which the warranty applied (45). Numerous other illustrations can easily be imagined.

Section 3. Defects in Form.

§ 72. Commencement of pleadings. Assuming that we can determine, from the preceding discussion, what are the facts which must be stated in any pleading, and that we can avoid the pitfalls which would make our pleading bad in substance, the next question is as to the proper form in which to put these allegations.

Obviously, it is natural and proper that each pleading should be so entitled that it can easily be told to what case it belongs. This is accomplished by beginning the pleading by the name of the court (46), the names of the parties to the suit (47), the date of the pleading (48), and, if the pleading is a declaration, the name of the form of action (49). These allegations combined are commonly called the commencement of the pleading. If any are omitted the other party may object to the pleading and appropriate relief will be granted. The manner of objecting is discussed below, §§ 91, 96.

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(45) Eberts v. Larned, 5 U. C. Q. B. 264.
(46) Gassett v. Palmer, Fed. Cas. 5265.
(47) Poling v. Moore, 58 W. Va. 233.
(48) Symonds v. Parmenter, 1 Wilson, 86.
(49) Lambert v. Thurston, Carthew, 108.

§ 73. Conclusion of pleadings. There are also formal conclusions to pleadings. These differ with the kind of pleading in question. The declaration usually concludes, "and therefore he brings his suit, etc." This conclusion refers to the bringing in of a suit (suite) or number of persons, who vouched for the general accuracy of the plaintiff's claim, a requirement of medieval English procedure. Though the practice has been obsolete for centuries, the formal conclusion of the declaration remains. No doubt, however, it could be omitted with impunity (50). More insisted upon are the proper conclusions for traverses and pleas in confession and avoidance. A traverse must conclude: "And of this the said defendant puts himself upon the country, etc." This is called concluding to the country, or tendering issue. The country here means the jury, the jury being drawn from the neighboring country. The original idea of jury trial was that it was a special unusual mode of trial, which parties could not be driven to, but which they could choose by mutual consent. Concluding to the country was expressing your consent to have the jury try the issue. The other party expressed his consent by filing a similiter, or joinder of issue. It reads, "And the plaintiff (or defendant) does the like." Every traverse had to conclude to the country or it was objectionable (51). This rule made jury trial compulsory, while preserving the form of consent.

A plea in confession and avoidance must conclude with a verification (52). This reads: "And this the said

(50) See Walter v. Laughton, 10 Modern, 253.
(51) Everett v. Bartlett, 20 N. J. L. 117.
(52) Henderson v. Withy, 2 Durnford & East, 576.

..... is ready to verify; wherefore he prays judgment, etc." As we have seen, a plea in confession and avoidance does not create an issue, and therefore a conclusion to the country would be improper. Verifying here means simply proving. In equity pleading and code pleading it means making oath to the truth of the pleading, which under those systems is often required. In the case of a plea in confession and avoidance, the pleader cannot refer the issue to the jury, and so he simply says he is ready to prove it if the other party denies it.

§ 74. **Allegations of place.** The common law required every material allegation to be stated as having occurred at a certain place. The original object of this was to determine the place where the jury should come from. The original notion of the jury was a body of men drawn from the neighborhood where the fact occurred, and who would therefore likely know about the fact, and could inform the court what the truth was. It was only gradually that they came to listen to evidence and to decide the fact in accordance with that evidence. When they had to act wholly or mainly on their own knowledge, evidently they must be gotten from near the place where the fact occurred (53). Any material fact might be traversed and the issue arise on it. So the place where each fact occurred had to be stated. But when the jury came to be triers of the fact, relying on evidence for their information, it was no longer necessary that they should be summoned from the place where the fact occurred. We should expect, then, that the allegation of place would cease to

(53) Ilderton v. Ilderton, 2 H. Blackstone, 145.

be considered material and necessary. The courts, however, decided that it was still necessary in order to give certainty to the declaration. Stating where the facts occurred would obviously apprize the defendant more definitely of just what cause of action he was to meet. A beating of the plaintiff in London and a beating of the plaintiff in Manchester would plainly be different affairs. The defendant should know which was meant. So the allegation of place was still held necessary (54).

It seems that often the allegations of place got the pleader into trouble. Either from defective information or carelessness, it constantly happened that the place alleged would not correspond with the actual place. The defendant's promise may have been alleged to have been made in London, whereas in fact it was just over the line in Westminster. This difficulty arose so commonly that it was finally held that the place alleged need not be proved, unless the actual place was in fact material (55). It might be material. If the defendant promised to build a house on lot one of block three of Tupper's Addition to Charlestown, it would not do for him to build a house anywhere. The place is material. Then it must be alleged and proved as alleged (56). But when not really material, the rule is that it need not be proved as alleged. Still the old rule that it must be stated to make the declaration definite has survived. If left out, it is a defect in form.

(54) Denison v. Richardson, 14 East, 291.
(55) Mostyn v. Fabrigas, 1 Cowper, 161.
(56) Sanderson v. Bowes, 14 East. 300.

§ 75. **Allegations of time.** The allegation of the time when each fact occurred never was requisite, except for certainty and definiteness. The summoning of the jury required the place to be stated; but no such necessity ever existed for stating the time. However, it was required for certainty, just as in the later development a statement of the place was required for certainty. And the allegation of time, like the allegation of place, became a mere matter of form unless it was really material. So today every traversable allegation must be stated, with a time when it occurred (57). But the time alleged need not be proven unless it is material (58).

§ 76. **Allegations of value.** In actions for the recovery of property or its value, it is sometimes held that the value of the property must be stated or the declaration will be bad in form (59). The notion at the bottom of this seems to be that the declaration must show some injury, and that if the property is worthless no injury has been committed. A study of torts informs us that often an action lies though no actual damage be done. The reason on which these cases go, therefore, seems erroneous.

§ 77. **Allegations of description.** In the same class of actions, to recover property or its value, it is often held that some description of the property is necessary. And clearly, there must be some description, or the declaration will be bad in substance. An action for trespass to a "close" will not do (60). The parish or at least the

(57) Ring v. Roxborough, 2 Cr. & J. 418.
(58) Arnold v. Arnold, 3 Bingham N. C. 81.
(59) Mayor v. Clarke, 4 B. & Al. 268.
(60) Moody v. Hinkley, 34 Maine, 200.

county, in which the close is situated, must be stated. In ejectment, a description from which the tract or piece of land may be identified is probably necessary (61). But an exact description, so that its boundaries could be determined, is not necessary (62). In trover and in case a very general description will suffice; but "goods and chattels" is insufficient (63). In replevin, the modern rule is the same as in trover. In the early cases, both in trover and in replevin, very great definiteness of description was required. The more liberal rule was first adopted in trover and case, on the notion that in those actions the specific goods were not to be recovered, but only damages, and that therefore less particularity of description was necessary. But finally it was seen that, even in replevin, a description sufficient to enable the sheriff to seize the goods could hardly be expected in every declaration. Besides, the good are ordinarily seized by the sheriff under personal instructions from the plaintiff; and, of course, they may be and regularly are seized before the filing of the declaration. So, in replevin also, the liberal rule, that a general description is enough, has come to prevail (64). The declaration is bad in substance if the description is insufficient. Strictly, therefore, this subject does not belong with defects in form. But the defect is very analogous to the omission to state place, time, or value.

§ 78. **Duplicity.** Duplicity was always considered a

(61) Knight v. Symms, Carthew, 204.
(62) Flanigan v. City, 51 Pa. St. 491.
(63) Martin v. Henrickson, 2 Lord Raym. 1007.
(64) Farwell v. Fox, 18 Mich. 166.

defect in form only (65), and, indeed, there could be no doubt about it, because duplicity occurs when a pleading is doubly or trebly good in substance. The plainest example of duplicity is a single plea, stating two valid defenses to the whole count. Thus, if the defendant, in one plea to a declaration on a sealed contract, should allege that the contract was a wager, and that he would not have assented to it but for the fact that he was unlawfully imprisoned by the plaintiff at the time and was thus compelled to, we would have a plain case of duplicity (66). That the contract is a gambling contract would be one defense; that it was obtained by duress would be the other. Stated in separate pleas they would be all right. But they must not be stated in one plea. The object of this apparent strictness was to keep the issue between the parties "single," and simple enough for a jury to comprehend.

§ 79. **Same: Multiple counts and pleas.** Compare with the rule against duplicity the allowance of two or more counts in the declaration, and of two or more pleas. The law apparently had to relinquish all objection to many issues provided each issue was single (67). Two or more counts in the declaration were allowed from very early times, without the aid of a statute. No doubt, one of the chief reasons for allowing several counts was to avoid a failure at the trial, because the cause of action could not be proved exactly as alleged. It is often difficult to tell

(65) Carpenter v. McClure, 37 Vt. 127.
(66) Purssord v. Peek, 9 M. & W. 196.
(67) Little v. Blunt, 13 Pick. (Mass.) 473.

in advance just what facts the jury will consider proved. You may know that the defendant promised you $100 for a horse. But he may testify and the jury may believe it was $90. Or the jury may conclude that no price was fixed, but that the defendant was to pay what it was reasonably worth. The plaintiff cannot tell which to allege. To avoid this difficulty, he was allowed to allege all three states of fact as different causes of action in separate counts. Whichever count he proved he would recover on. Of course, really separate causes of action were also stated in separate counts.

At common law several pleas were not allowed. There was the same reason for allowing several pleas, though it did not apply so often, probably; namely, that the defendant might think he had one defense, while the jury might decide he had another. The defendant, therefore, needed the right to plead all defenses which he had any hope of proving. This right was not extended to him, however, until 1706. By a statute (68) passed in that year, the defendant was allowed to plead as many defenses as he might have. But this statute did not permit several replications, rejoinders, or further pleadings, and it did not permit the defendant to use a demurrer and a plea at the same time (69).

§ 80. **Same: General issues and replication de injuria.** It may have occurred to the reader that the general issues are violations of the rule against duplicity. They clearly are. By using a general issue the defendant may set up

(68) Stat. 4 Anne. ch. 16, sec. 4.

(69) Haiton v. Jeffreys, 10 Mod. 280.

very numerous defenses by one plea. They simply form a clear exception to the general rule.

There was a general traverse allowed in the replication, which was another exception to the rule against duplicity. This general traverse in the replication was called the *replication de injuria.* By its use the plaintiff could traverse all the facts alleged in any one plea. Perhaps it should be pointed out that denying more than one fact is duplicity. Suppose that, to an action for a battery, the defendant pleads that he is an officer, and that he had reasonable ground to suspect that a felony had been committed, and reasonable ground to believe that the defendant committed it. These facts are all necessary to make this plea good. If the plaintiff denies that the defendant is an officer, that is a sufficient replication. If the plaintiff denies that the defendant had reasonable ground to suspect the commission of a felony, that is alone sufficient to overthrow the plea. Likewise, a denial of the defendant's reasonable ground for suspecting the plaintiff would overthrow the plea. Any one of these being a good replication, the joinder of all three denials in the replication would make a replication trebly good in substance, and that is duplicity (70). But this denial of several facts in the plea may be accomplished by the replication de injuria.

§ 81. **Replication de injuria: Limitations upon use.** To the use of this replication there are, however, several limitations: (1) It can only be used to traverse pleas

(70) Tubbs v. Caswell, 8 Wend. (N. Y.) 129.

in confession and avoidance in excuse (71). Of course it cannot traverse a traverse, as issue must be joined on a traverse. But it was not allowed to be used to traverse pleas in confession and avoidance in discharge. What is the difference between pleas in confession and avoidance in excuse and in discharge? Pleas in discharge show that a cause of action which once existed has been discharged or ended. Pleas in excuse show that no cause of action ever arose. Thus, a plea of illegality is a plea in excuse, a plea of coverture is a plea in excuse, and a plea of breach of warranty is a plea in excuse. But pleas of release, the statute of limitations, or accord and satisfaction, are pleas in discharge. To the latter class of pleas de injuria may not be used. No doubt the reason that pleas in discharge could not be denied by de injuria arose wholly out of the wording of the replication. It read that the defendant did the act "de injuria sua propria absque tali causa" (of his own wrong without such excuse). Obviously the latter words would be meaningless as applied to a plea in discharge. (2) It cannot be used to deny authority from the plaintiff, interest in realty, or matter of record (72). It was thought that the plaintiff knew positively whether he had given authority or not, and so should either admit giving it or stake his case on a denial that he gave it. Title to realty was considered too important to be tried with other facts, and so had to be denied separately. Matter of record (whether a certain record existed) was tried by the court and not by

(71) Berry v. Cahanan, 7 N. J. L. 77.
(72) Crogate's Case, 8 Co. 66.

the jury, and so should not be put in issue with matters that would be tried by the jury.

§ 82. **Argumentativeness.** There are several other miror instances of defects in form of which but three will be mentioned. *Argumentativeness* consists in denying a fact by stating another fact inconsistent with it, instead of denying the fact directly. Thus, suppose that the plaintiff alleges that he painted a portrait of the defendant. A direct denial would be that the plaintiff did not paint a portrait of the defendant. An argumentative denial would be that, ever since the order for the portrait was given, the plaintiff has been totally paralyzed. This was thought bad, because it did not create a clear issue (73). Was the painting of the picture, or the paralysis, the fact to be tried by the jury? Also, if the defendant could argumentatively deny the plaintiff's allegation, then the plaintiff would have equal right argumentatively to deny the defendant's plea, and thus a termination of the pleadings would be indefinitely postponed. However, these objections were not very serious in reality, and argumentativeness is only a defect in form (74).

§ 83. **Recitals.** The use of *recitals* of material facts, instead of direct allegations of the facts, is also a defect in form (75). Suppose a declaration on a contract should state that, by a certain writing, it appears that the defendant promised to convey his house and lot known as

(73) Fortescue v. Holt, 1 Ventris, 213.
(74) Muntz v. Foster, 6 M. & G. 734.
(75) Collier v. Moulton, 7 Johns. (N. Y.) 109.

his Home Place to the plaintiff, and should then go on and state the other allegations. It would be defective. The promise is not expressly stated, but it is merely recited as appearing in the writing.

§ 84. **Failure to use general issue when possible.** A defect in form, which used to be constantly before the courts, is the use of some other pleading when the general issue should be used. It was the common law, that, if the general issue would deny the fact desired to be denied, then it must be used, and the use of a specific traverse of the fact would be bad in form. Even more clearly, the use of a plea in confession and avoidance, argumentatively denying the fact, would be bad in form (76). But generally defenses in discharge could be pleaded in confession and avoidance, without error, even though they could be proved under the general issue. Thus, in an action of assumpsit, a release could be proven under the general issue; but it could also be pleaded in confession and avoidance, if the defendant so elected. With regard to defenses in excuse, there is doubt whether this option exists or not (76).

Section 4. Dilatory Defects.

§ 85. **Lack of jurisdiction.** No doubt the most important of the possible dilatory defects is lack of jurisdiction. This occurs when the court in which the action is brought has no jurisdiction to entertain the proceedings. Of course the lack of jurisdiction will not be a defect in the pleading, unless it appears in the pleading that there is

(76) Thayer v. Brewer, 15 Pick. (Mass.) 217.

a lack of jurisdiction. But this need not always appear affirmatively. The rule is that in the case of actions brought in courts of *very limited* jurisdiction, like those of justices of the peace, for instance, it must appear in the declaration that the action is within the jurisdiction of the court. Facts must be stated, if necessary, to show that the case is within the court's jurisdiction. If you cannot tell from the declaration whether it is or is not within its jurisdiction, the declaration is defective (77). On the other hand, in the case of courts of *wide* or *general* jurisdiction, the declaration is not defective, unless it shows affirmatively that the case is outside the court's jurisdiction. If it does not appear one way or the other the declaration is good (78). What is meant by jurisdiction, and the extent to which lack of jurisdiction can be waived, is discussed in the article on Practice, elsewhere in this volume.

§ 86. **Misjoinder of actions.** We have already seen that the plaintiff may use several counts in his declaration. Each count will purport to state a different cause of action. Sometimes they are really different statements of the same cause of action, for the purpose of having a count for any possible state of facts the jury at the trial may find true. Often they are statements of totally distinct causes of action. But the common law thought it unwise to allow all causes of action to be thus joined. To have two entirely different sorts of cases presented to the jury, at once, was thought to be likely to

(77) Trevor v. Wall, 1 Durn & E. 151.
(78) Flanders v. Atkinson, 18 N. H. 167.

confuse them. The rule as finally established was that all causes of action, which are suable in the same form of action, may be joined, but two actions different in the form of action cannot be joined (79). There were two or three exceptions to this general rule, based on historical grounds. Case and trover could be joined, because they were originally the same (80). Trover was an offshoot from case. Special and general assumpsit could be joined, as they were likewise originally considered as one action (81). But the general rule was that no two actions which were different in form could be joined. There were other limitations, which are too detailed for discussion here. Now suppose the plaintiff joins two causes of action, which cannot by law be joined. We have then a dilatory defect. Both causes of action are good; both may yet be recovered upon; but the suit is erroneously started, and it cannot proceed. Time must be taken to bring new separate suits. The defect is plainly dilatory only.

§ 87. **Misjoinder and non-joinder of parties.** These defects almost explain themselves. An example of each will suffice to make them perfectly clear. A, B, and C bring an action on a contract against M. The declaration alleges the contract to have been between M on the one side, and A and B on the other side. No facts are alleged showing that C has acquired any interest in the contract. The declaration is defective for the *misjoinder* of C (82).

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(79) Howe v. Cooke, 21 Wend. (N. Y.) 29.
(80) McConnell v. Leighton, 74 Me. 415.
(81) Kirkpatrick v. Bethany, 1 Ala. 201.
(82) Buckley v. Collier, 1 Salk. 114.

If, on the other hand, A sues M on the same contract, without joining B as a co-plaintiff, and the contract as alleged was between A and B on the one side and M on the other side, we have a case of *non-joinder*. This is equally a defect (83).

§ 88. **Incapacity of parties.** Imagine that A sues D for a tort, that the tort is fraudulently deceiving A into buying a worthless horse, and that the declaration alleges that A was permanently insane and therefore the more easily deceived. Such a declaration would be defective (84). It alleges that A is insane, and insane persons cannot sue alone. They must sue by their guardian, or by a next friend. There is an *incapacity of the plaintiff* apparent in the declaration. But the objection is evidently dilatory only; it does not bar the plaintiff recovering; it only delays him, until he puts his proceedings into a proper condition.

Another form of incapacity of parties occurs, when the suit purports to be brought by an executor or administrator, or a corporation, and it is not alleged that the plaintiff has ever been made an executor, an administrator, or a corporation. The argument is that the plaintiff is suing in other than his natural capacity, that it cannot be assumed that he has any such fictitious capacity, that therefore he must show that he has, and that a failure to set forth facts which give him such a fictitious capacity is a defect (85). All courts are not agreed, however, as

(83) Ehle v. Purdy, 6 Wend. (N. Y.) 629.

(84) For an analogous case, see Bell v. Chapman, 10 Johns. (N. Y.) 183.

(85) Cummings v. Edmunson, 5 Porter (Ala.) 145; (administrator): Holloway v. Ry. Co., 23 Tex. 465 (corporation).

to this matter. It is often held that the fictitious capacity will be assumed prima facie from the fact that the suit is brought in that capacity, or it is held that suing in the fictitious capacity amounts to an allegation that the plaintiff has such a capacity (86). The capacity of a person suing in his own natural capacity is assumed. Insanity, infancy, coverture, or other disability must affirmatively appear in the declaration to make it defective. The real dispute, where the plaintiff sues in a fictitious capacity, is, will the court assume that the fictitious capacity exists, unless it affirmatively appears that it does not; or must the plaintiff affirmatively show that it exists. The more liberal view seems the wiser.

§ 89. **Misnomer. Another action pending.** Lastly we may notice two other dilatory defects. *Misnomer* used to be a common defect in the days when all pleadings had to contain not only the exact names, but also all the titles or additions of each party to the suit. It is still a defect which should be avoided (87). That another action is pending for the same cause of action is a common dilatory objection today. The general rule is that another action pending in another jurisdiction is no objection (88); but, if another action be pending in the same jurisdiction, for example, in the state courts of the same state, that is an objection (89). Of course, the declaration is not defective in this respect, unless it appears on its face that there is another action pending.

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(86) Bennington Co. v. Rutherford, 18 N. J. L. 105.
(87) Gilbert v. Nantucket Bank, 5 Mass. 97.
(88) Bowne v. Joy, 9 Johns. (N. Y.) 221.
(89) Thomas v. Froelow, 17 Vt. 138.

§ 90. **Dilatory defect not appearing in pleading.** In all these cases of dilatory objections, the defect in the suit may be present in fact and yet not appear on the face of the declaration. In that event, the objection cannot be taken by complaining of the declaration. It is to be taken by a dilatory plea (90). Dilatory pleas are treated in §§ 113-15, below.

Section 5. Methods of Objecting to Defective Pleadings.

§ 91. **General and special demurrers.** Most books on common law pleading state that a general demurrer takes advantage of defects in substance, while a special demurrer is necessary to take advantage of defects in form. This is true of the later common law pleading. Originally, however, all defects, whether of substance or form were open on general demurrer. Duplicity alone may have required a special demurrer (91). Whether it did or not is not certain on the authorities we have. By statutes passed in the reigns of Queen Elizabeth and Queen Anne it was provided that defects in form shall not be regarded, unless objected to by a special demurrer (92). These statutes of Elizabeth and Anne represent the common law in the United States (93). A special demurrer is simply a general demurrer, the form of which has already been given (94), with the addition of a sentence or clause expressly stating in what respect the form of the pleading

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(90) Harris v. Harris, 2 Harrington (Del.) 354.
(91) Anonymous, 3 Salk. 122.
(92) Statutes, 27 Eliz. ch. 5, sec. 1; 4 Anne ch. 16, sec. 1.
(93) Parlin v. Macomber, 5 Me. 413.
(94) § 10, above.

was bad. The common statement above does not indicate how dilatory defects are to be made the subject of objection. It is well settled that a general demurrer takes advantage of them (95). By the early common law, a general demurrer took advantage of all defects. The statutes of Elizabeth and Anne required a special demurrer only for defects in form. This left defects in substance and dilatory defects to be objected to by a general demurrer.

§ 92. **Demurrers in general. Speaking demurrers.** The general nature and use of demurrers has already been sufficiently explained (96). That a demurrer admits the facts alleged in the preceding pleading, and raises an issue of law as to whether those facts constitute a cause of action or a defense, is no doubt understood. But there are some questions concerning demurrers that have not been touched upon. These will now be considered.

A "speaking" demurrer has no greater effect than a simple demurrer. It is one that attempts to show that the preceding pleading is bad by stating new facts in the demurrer. This statement of new facts is the "speaking." It is the function of pleas, replications, and the other pleadings to state facts. After they are stated they may be denied and an issue of fact thus raised. But a demurrer's only function is to object to the sufficiency of the facts already stated by the other party. No issue of fact can arise on it, or out of it. It creates a question of law only, to be decided by the court. The "speaking"

(95) Bentley v. Smith, 3 Caines (N. Y.) 107.
(96) § 10, above.

part of these curious demurrers is therefore of no effect (97); but it does not destroy the ordinary use of the demurrer. It will still raise the question whether the preceding pleading is on its face valid (97).

§ 93. **Demurrer opens the record.** A demurrer opens for the court's consideration the entire line of pleadings which it terminates, and judgment is given against the party who made the first fault which has remained uncured (98). How defects in pleadings may be cured is the subject of the next section of this chapter, and will not be discussed here. Suppose the plaintiff files a declaration in trespass containing two counts: the first, a valid count; the second, bad in substance. To count one, the defendant pleads not guilty, the general issue. To count two, the defendant pleads two pleas: (1) The statute of limitations; (2) that the plaintiff's son invited the defendant to enter on the said land. The plaintiff joins issue on the plea of not guilty; he traverses the plea of the statute of limitations; he demurs to the plea of invitation from the plaintiff's son. How far is this record of pleadings open on the demurrer? The demurrer only opens the line of pleading which ends in the demurrer (99). Plainly the first count and the plea of not guilty constitute one line of pleading. The demurrer has no connection with that, and so it is not to be considered. Two lines of pleading are based on the second count: (a) the second count, the plea of the statute of limitations, and the traverse of the statute; and (b) the second

(97) Wyoming Co. v. Bardwell, 84 Pa. St. 104.
(98) Murdock v. Winters, 1 Harris & Gill (Md.) 471.
(99) Davies v. Penton, 6 B. & C. 216.

count, the plea of invitation, and the demurrer. Obviously the demurrer does not terminate line (a), and so that line is not to be considered on the demurrer. Line (b) does end in the demurrer, and so that line of pleading is open. That line being open, judgment goes against the party who made the first fault. The plea is clearly bad, because a son has no right to invite people on his father's land. A son living with his father would have a qualified permission to do so, but it does not appear that this son was living with his father, or had any authority whatever. So the plea is bad. But the second count is also bad by the statement of the case. The plaintiff therefore made the first fault, and the defendant would be given judgment. Thus a demurrer reaches back and tests every pleading in that line.

§ 94. **Same: Defects in form.** This opening of the record does not apply to defects in form (100). Defects in form can only be taken advantage of, as we have seen, by a special demurrer, specially calling attention to them. A special demurrer to the replication would not point out defects in form in the defendant's own plea, but no case has come to the writer's notice where it has pointed out defects in form in the declaration. So defects in form in the plea and declaration would not be open for consideration because not specially pointed out. The requirement that defects in form should be pointed out has no application to dilatory defects, and therefore they would be open, when a demurrer to a subsequent pleading was carried back to the declaration, unless they are

(100) Darling v. Gurney, 2 C. & M. 226.

waived by a failure to take immediate advantage of them by a demurrer directly to the declaration. Whether there is such a waiver is not clear on the authorities (101).

§ 95. **Finality of judgment on demurrer.** At common law, a judgment upon a demurrer was final for the plaintiff or for the defendant. This generally meant that no new action for that cause of action could be brought. Thus, if the plaintiff demurred to the defendant's plea and the plea was held good, the defendant won for all time. The plaintiff could never recover on the cause of action stated in the declaration. The matter had become res judicata (102). If the plea was held bad, the plaintiff obtained a final judgment on which, as soon as the damages were assessed by the court, or by a jury specially empanelled if they were not definite liquidated damages, execution could be issued.

But sometimes a new action might be brought. Suppose the defendant demurs to the plaintiff's declaration and the declaration is held bad. That simply decides that the facts alleged do not constitute a cause of action. The plaintiff might begin a new suit, alleging the old facts and enough new ones to make a cause of action and thus win (103). But if, on the defendant's demurrer to the plaintiff's declaration it was held good, the plaintiff would obtain a final judgment.

If there were several issues raised by the pleadings, the judgment on one of them would not necessarily settle the

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(101) That there is such a waiver, see Boyce v. Vandensen, 49 Vt. 26. To the contrary, see Bond v. Hilton, 51 N. Car. 180.

(102) Coffin v. Knott, 2 G. Greene (Ia.) 582.

(103) Lampen v. Kedgewin, 1 Mod. 207.

entire case. That the issue on which judgment was given was an issue of law, created by a demurrer, would not alter this fact. Thus, if the defendant put in two traverses to the declaration, one good and one bad, and the plaintiff joined issue on the first and demurred to the second, a decision of the demurrer in favor of the plaintiff would simply destroy the second plea as a defense. The first plea would still remain to be tried by a jury (104). If found true, the defendant would win. But suppose the decision on the demurrer in this case should be for the defendant. That would establish the validity of one of his defenses, and, since a defendant only needs one good defense, he would win the whole case (105). A trial of the other plea would become unnecessary and would not be held.

Today, statutes almost everywhere provide that, when a demurrer is decided against the demurrant, he may withdraw his demurrer and plead in some other way (106). Likewise, when the decision is against the demurree, he may amend his defective pleading. Usually this privilege is granted by the statute, subject to the discretion of the trial court, but the trial court practically always grants its consent.

§ 96. **Motions.** Occasionally, at common law, defects in form were taken advantage of by motion, instead of by special demurrer. Sometimes the court called the defect an irregularity, rather than a defect in form; but

(104) Denby v. Graff, 10 Ill. Ap. 195.
(105) O'Brien v. Hardy, 3 Harris & Johnson (Md.) 434.
(106) Maine v. Peck, 60 Me. 498.

the difference between irregularities and defects in form is so hazy as to be close to non-existent. However, the defects which were to be objected to by a motion at common law were mainly defects in stating the title of the court, the date, or the names of parties (107). These motions, for defects in form, were made before the trial, at the time when a demurrer could be filed. They differ totally from the motions made after the trial, which are the subject of the next subsections.

§ 97. **Motions after the verdict: Arrest of judgment.** We are interested only in those motions made after the verdict, which object or take advantage of defects in the pleadings. These are the motions *in arrest of judgment* and the motion *for judgment non obstante veredicto* (notwithstanding the verdict). The motion in arrest of judgment is a motion made by the defendant, to prevent the court from giving a judgment for the plaintiff, in accordance with the verdict for the plaintiff which has been rendered by the jury. This motion is made on the ground that, though the plaintiff has gotten the verdict, he has gotten it on defective pleadings. The duty of the jury, in giving its verdict, is not to decide whether the plaintiff has a cause of action or not, but is merely to settle the truth of the plaintiff's pleading, which the defendant has denied, or the truth of the defendant's pleading, which the plaintiff has denied. Therefore, if the plaintiff has gotten a verdict upon a pleading which is itself worthless, he should not be given a judgment upon that verdict.

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(107) See Ripling v. Watts, 4 Dowl. 290; Holland v. Tealdi, 8 Dowl. 320.

§ 98. **Same: Illustrations.** Suppose the plaintiff sues the defendant for a trespass on land, and that the defendant pleads that he was an officer of the law with a warrant entitling him to levy on the plaintiff's goods, and that the plaintiff owned goods situated on the land. To this plea, the plaintiff replies that the warrant was issued in a suit by Jones against the plaintiff, and that Jones had no right to recover in the said suit. The defendant rejoins that Jones had a right to recover in the said suit. This makes an issue of fact which will be tried by the jury. The jury's verdict will determine simply whether Jones had a right to recover in the suit against the plaintiff or not. Suppose the verdict is for the plaintiff, that Jones had no right to recover. The finding of this fact is totally immaterial to the plaintiff's right to recover against the defendant, the officer. An officer is justified in acting under a fair warrant, no matter what were the rights of the parties in the suit in which the warrant was issued. Obviously then, to let the plaintiff have a judgment because he has proved a fact which is totally immaterial, would be improper. Under such circumstances, the defendant may move to arrest or stop the judgment for the plaintiff, on the ground that the plaintiff's pleadings are defective (108). Again, if the plaintiff's declaration states facts which do not constitute a cause of action, the defendant may move in arrest of judgment after a verdict for the plaintiff. If the declaration did not state a cause of action, the defendant, of course, could have thrown it out by general demurrer, but, if the defendant's counsel

(108) Barret v. Fletcher, Cro. Jac. 220.

did not notice the defect at that stage of the case, he can still, even after the trial, take advantage of the defect by a motion in arrest of judgment (109). The reason for this is that no issue *material to the cause of action* could arise, when no cause of action was stated in the first place. Therefore, a jury's verdict was useless.

§ 99. **Same: Judgment non obstante veredicto.** At common law, the motion for judgment non obstante veredicto was almost invariably made by the plaintiff. This motion was very similar to the motion in arrest of judgment. It was used in a case where the defendant had obtained the verdict of the jury, and where that verdict found merely that some immaterial fact existed. The defendant, of course, was no more entitled to a judgment based on a totally immaterial fact, than was the plaintiff. Therefore, if the jury's verdict merely found the truth or existence of such a fact, no judgment should be rendered on the verdict. However, there was this limit upon the right of the plaintiff to have a judgment notwithstanding the verdict: he could not have it unless the defendant's pleadings confessed the plaintiff's declaration. The orthodox rule was, that this confession of the plaintiff's declaration must be an express confession of each fact alleged in the declaration, clearly and explicitly made (110). The theory was that the plaintiff was entitled to judgment on the confession of the defendant himself. A mere plea in confession and avoidance, which did not *expressly* confess the declaration would not do,

(109) Rush v. Aspinwall, 2 Douglas, 679.
(110) Pitts v. Polehampton, 1 Ld. Ray. 390.

and most pleas in confession and avoidance, of course, would not expressly confess the declaration. The confession that is necessary, in a plea of confession and avoidance, is a tacit confession arising out of the failure to deny the declaration. But the orthodox view, that an express confession is necessary to enable the plaintiff to obtain judgment non obstante veredicto, has been departed from in some modern cases. It has been held that the tacit confession of an ordinary plea in confession and avoidance is sufficient to entitle the plaintiff to judgment notwithstanding the verdict (111). It has also been held that a traverse by the defendant may amount to a sufficient confession of the other facts in the declaration which were not traversed (112).

§ 100. **Same: Illustration.** Suppose the plaintiff sues the defendant on a contract alleging the defendant's promise, the consideration for it, performance by the plaintiff, and the breach of the contract. Suppose this declaration also states the date on which the contract was made. The defendant pleads two traverses: First, a denial of the promise; second, a denial that the contract was made on the date alleged. Upon these two issues the case goes to the jury, who find for the plaintiff on the first traverse, and for the defendant on the second traverse. Usually a defendant, who wins on one plea, wins the case, because a defendant need not have more than one good defense. But this defendant has won on a plea which put in issue an immaterial fact. The date of

(111) Pim v. Grazebrook, 2 C. B. 429; Goodburne v. Bowman, 9 Bing. 532.

(112) Couling v. Coxe, 6 C. B. (Eng.) 903.

the contract is not material to the plaintiff's right to recover, unless the statute of limitations is relied upon, and that has not been done. So the fact that the plaintiff was mistaken as to the date of the contract should not prevent him from recovering. The defendant, however, has not expressly confessed the facts in the declaration; neither has he used a plea in confession and avoidance tacitly confessing those facts. But he has denied only his promise and the date of the contract, thereby tacitly admitting the other facts alleged in the declaration. The general rule, of course, is, as we have already seen, that all facts not denied are admitted. The one material fact that the defendant did deny, namely, his promise, the plaintiff has proved to be true. So all the material facts in the declaration have either been tacitly admitted by the defendant, or proven true by the plaintiff. In such a case, also, it has been held that the plaintiff is entitled to judgment non obstante veredicto (113).

§ 101. **Same: Further illustration.** But suppose, in the case just discussed, the defendant puts in only one plea, namely, the denial of the date of the contract, and that he gets a verdict in his favor on that plea. Here also, the defendant ought not to have judgment, because he has won on an immaterial issue; and it could be argued, that, by simply denying the date of the contract, the defendant has admitted all the other facts in the declaration which he did not deny, and that, since those other facts are all material facts, the plaintiff is entitled to judgment notwithstanding the verdict, on this tacit confession of the

(113) Couling v. Coxe, 6 C. B. (Eng.) 903.

defendant. But the courts have never gone that far (114). They argue that the defendant has put in what he probably supposed was a good defense; that he has proven that supposed defense to be true; that, if he had known that this was not a good defense, he probably would have relied upon some other defense which he may have had; that, therefore, he should be given a chance to set up this other possible defense. The result was, that, instead of giving the plaintiff a judgment non obstante veredicto, the court ordered a repleader in such a case (114). This means that the verdict would be set aside and the pleadings be made over again, beginning at the point where the defective traverse of the defendant was filed.

§ 102. **Different effect of motions arresting and giving judgment.** There was this difference between the effect of arresting the judgment on the motion of the defendant, and giving the plaintiff judgment on his motion: When the judgment was arrested, the plaintiff usually lost that case; but generally he had a right to begin a new case on the same cause of action that he had hoped to recover on in the first case. On the other hand, if the plaintiff was given judgment notwithstanding the verdict, that judgment enabled him to take out execution against the defendant, and thus to recover the amount he was suing for; and the defendant had no way of setting up a new defense, or of otherwise resisting the plaintiff's recovery (115). A judgment for the plaintiff on his motion settled the matter for all time, but an arrest of judgment

(114) Duke of Rutland v. Bagshawe, 19 L. J. Q. B. 234.
(115) Wilkes v. Broadbent, 1 Wilson 63.

granted the defendant usually disposed merely of that particular suit. Thus, if the plaintiff should gain a verdict upon a declaration which is totally defective, the defendant would be granted a motion in arrest of judgment. But this would be on the ground that the facts stated in the declaration do not constitute a cause of action. It would simply settle, that, if the plaintiff should begin a new action setting forth in the declaration the very same facts, he would lose. But if he began a new action, setting forth other or additional facts, plainly the judgment against him in the first case would settle nothing as to his right to recover in the second. Therefore, usually he can begin a new action (116).

§ 103. **Objections to pleadings in appellate courts.** In almost all jurisdictions a substantial defect in the declaration may not only be taken advantage of in the trial court by the motions we have just discussed, but it may be assigned as the basis of an appeal. This is true, even though the declaration was not objected to in any way in the trial court (117). Whether such an objection, on appeal, can be taken to defects in the defendant's pleadings, or to defects in the plaintiff's pleadings other than the declaration, is not settled. The indications seem to be that it is only when the declaration is defective, that you have a sufficient ground for an appeal without having objected to the pleadings in the trial court.

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(116) Bulling v. Rogers, Barnes, 278.

(117) Slacum v. Pomery, 6 Cranch (U. S.) 221.

SECTION 6. CURING DEFECTS IN PLEADINGS.

§ 104. Curing defects in form and dilatory defects. After the statutes of Elizabeth and Anne already referred to (§ 91), which in effect originated special demurrers, defects in form could not be taken advantage of except by a special demurrer. A special demurrer necessarily had to be filed, before the pleadings were closed by the creation of issues of fact or of law. The result was that defects in form were all cured by the termination of the pleadings. But more than this was true. A special demurrer had to point out, as already explained, the defects in form which the party claimed existed. If the defendant thought there were defects in form in the declaration of which he ought to take advantage, he would put in a special demurrer directly to the declaration. It is possible that a special demurrer to a replication might point out defects in the declaration. But no such case has ever arisen, so far as is generally known. The result is that defects in form are never taken advantage of except by a special demurrer, put in directly to the pleading claimed to be defective. This has led to the statement of the rule that defects in form are cured by pleading over; which means, that, if a party puts in some other kind of a pleading than a special demurrer, the defects in form that he might have taken advantage of are never taken advantage of later, and so for all practical purposes are cured (118).

Whether dilatory defects were cured, as were defects in form, by failure to take advantage of them at once, or

(118) Baker v. Baker, 13 Met. (Mass.) 125.

only in the same way as defects in substance, is in doubt, as already stated (119). The methods by which defects in substance are cured are the subjects of the following subsections.

§ 105. Curing defects in substance: Express aider. The doctrine of *express aider* can best be explained by an illustration. Suppose the plaintiff alleged, in a declaration for trespass to goods, that he was traveling along the highway in a carriage, and that the defendant with force and arms seized said carriage, and ejected the plaintiff from it, and drove the said carriage away. This declaration is defective because it does not state that the carriage belonged to the plaintiff or was in his possession. For all that appears in the declaration, the plaintiff may have been driving with a friend, who owned the carriage and was in possession of it. The declaration is, therefore, substantially defective, and would be bad on general demurrer. Suppose, now, the defendant puts in the following plea: "The defendant says that he took the said carriage of the said plaintiff out of the possession of said plaintiff, as well he might, because he says the said plaintiff was at that time an alien and an enemy of the United States, and was using the said carriage, at the time when the defendant seized it, in aiding and abetting the enemies of the United States, and the defendant was ordered by John Jones, general in charge of some of the forces of the United States, to seize the said carriage." This plea cures the declaration by the so-called effect of express aider. The plea expressly states the facts which

(119) § 94, above.

were missing in the declaration. It states in so many words that the plaintiff was the owner of the carriage and in possession of it. The general rule is, that, if any pleading is defective in substance because of the omission of some necessary allegation, that defect will be cured if a subsequent pleading of the other party expressly makes the allegation which the defective pleading lacked (120). This rule, of course, enables a plea to be cured by a replication, a replication to be cured by a rejoinder, or any other pleading to be cured by subsequent pleadings of the adversary.

§ 106. **Same: Curing by verdict.** In discussing the possibility of objecting to pleadings after the trial is over, and even on appeal, nothing was said as to what objections are then open. The general rule is that all substantial defects may then be insisted upon. But, independently of the curing by express aider, certain substantial defects may be cured by the mere fact that a verdict has been rendered for the party whose pleading was defective. It has already been stated that pleadings are to be construed against the person pleading them (§ 55). The curing of defects by verdict is really the result of a reversal of this rule of construction, after a verdict has been rendered. At that stage of the proceedings, if a pleading is objected to by any of the methods already discussed, the pleading will be held good, if, by any reasonable construction, the necessary allegations may be considered as contained in it.

(120) Brooke v. Brooke, 1 Siderfin, 184.

§ 107. **Same: Illustration and comment.** In an English case, where a servant was suing his master for injuries received while traveling in a van belonging to his master, it was necessary for the plaintiff to allege that he was ordered to go *in* the van. In his declaration he stated that he was ordered to go *with* the van. Here was a defect, which the defendant insisted made the declaration bad, on a motion in arrest of judgment. The court, however, held that, whatever the result might have been if the declaration had been demurred to, the defect was cured by the verdict which the plaintiff had obtained, thus construing the declaration most favorably to the plaintiff. An order to go *with* the van should be taken as meaning an order to go *in* the van, since that was the only general way of going with the van (121).

The reason at the bottom of this rule, as has often been stated by the courts, is, that if an allegation is essential, and if it is stated, according to a liberal construction of the pleading, the judge at the trial will undoubtedly instruct the jury that they must find that allegation to be true. In instructing the jury, he will not omit having them pass on a fact which he knows is material, and which is fairly well stated in the pleading. After the trial is over, then, it would be wrong to reverse the case for a defect in the pleadings, which was so slight that in all probability it would not lead to any failure to have the fact proved at the trial. So all defects will be considered cured, after the verdict, if, construing the pleading liberally, the defects would not exist.

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(121) Priestley v. Fowler, 3 M. & W. 1.

§ 108. **Same: Curing by amendment.** In any case where a pleading is held defective in form or substance, or because of dilatory objections, the court may be asked to permit an amendment of the pleading to cure such defects. There is one other case where an amendment may be sought. Suppose the plaintiff sues on a contract, the terms of which he states in the declaration. The defendant files a plea denying this contract. At the trial the plaintiff has abundant evidence to prove a contract very similar to the one he alleged. But the contract he can prove differs from the contract alleged in one or more material points. The plaintiff will fail, because, though he has proved a good cause of action, it is not the cause of action which he alleged. This rule, that one must prove the cause of action or defense alleged in the pleading, is known as the doctrine of *variance* (122). Proof differing from the pleadings is a variance. The question then arises, can the plaintiff, at the trial in the case supposed, amend his declaration so as to state the contract he was able to prove, and thus obviate the variance? We may ask, what are the principles governing the allowance of amendments, under these various circumstances.

§ 109. **Early law regarding amendment of formal defects.** With regard to all defects in form, or irregularities, the universal rule today is that they may be amended at any stage of the case, when the objection can be and has been made to them (123). This was not always true. In the earliest days of common law pleading, the judges

(122) Mann v. Edwards, 138 Ill. 19.
(123) Brown v. Foster, 6 R. I. 564.

adopted a very liberal attitude toward amendments. Indeed, in the early days, pleadings were oral, and when a mistake was made it was objected to immediately and immediately amended, even before it was entered on the record of the case (124). Thus the pleading went on the record in an amended form in many cases, and the judges were so wise as to permit slight corrections of the record, even after the entry, to make the pleadings proper. It was claimed by some that the judges were guilty of permitting wrongful changes of the record. Edward I of England ordered these wrongful changes stopped. In 1289 Edward returned from a foreign war, and fined many of the judges very heavily for making alleged wrongful changes. It has been thought that possibly the changes were proper, and that this was simply a means used by the king to raise money—of course, a very improper means. The result was that the judges refused to permit any further amendments of the pleadings, when once they were entered on the record (125). Not long afterwards, the custom of pleading orally was supplanted by the custom of writing each pleading and filing it with the clerk, to be copied on the record. The strictness, which the fines of Edward I induced the judges to apply to amendments, was carried over to the written pleadings, so that when once a pleading was filed it could not be amended. Cases were often lost for the most trivial defects in form.

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(124) Rush v. Seymour, 10 Mod. 88.

(125) See 3 Blackstone, Commentaries, *407-*410.

§ 110. Statutes of jeofails. Later liberality of amendment. The hardship arising from the state of the law just described was cured in part by a series of statutes, known as the statutes of *jeofails*. These statutes provided for the disregard or amendment of defects in form. There were a number of these statutes passed from time to time through several centuries. The statutes of Elizabeth and Anne, requiring a special demurrer for defects in form, were two of the statutes of the series. These statutes, however, did not authorize amendments of defects in substance, or of dilatory defects. Gradually, however, the courts revived the old leniency with regard to allowing amendments, until today the rule may be stated that any amendment of the pleadings may be made at any time which the court in its discretion considers proper, subject to such terms as the court may think proper to impose to make it just (126). There is, however, one firmly established and very important limitation upon this power of amendments to be noticed below; and it must not be supposed that in every jurisdiction the power is exactly as broad as the rule above stated. Minute limitations may be found in the law of probably every jurisdiction, but the rule everywhere approximates somewhat closely to the general principle above stated.

§ 111. Limitation upon amendments. The important limitation just referred to is that no amendment may be made which will so alter the pleading as to set up an entirely new cause of action or defense. The reason for this limitation is plain, upon a little reflection. If the

(126) Murry v. Harper, 3 Ala. 744.

plaintiff could sue the defendant on a contract, and then later amend his declaration so as to state an action for slander, the statute of limitations might often be avoided in the following way. In order to prevent the statute of limitations from barring your cause of action, you need only begin a suit within the period fixed by the statute. Now an amendment does not make a new suit, but is simply a continuation of the suit already begun. Suppose the plaintiff sues on a contract January 1, 1900, and, on January 1, 1902, he wishes to amend his declaration to an action for slander. Let us suppose also that the action for the slander was barred by the statute of limitations, January 1, 1901. If the plaintiff were allowed to amend his declaration on the contract, so as to change his action to one for slander, he would be suing for the slander in an action begun before the statute of limitations had barred a suit for slander. Yet, really, he would not have started an action for the slander, until a year after such an action was barred. This illustrates how permitting an amendment totally changing the cause of action or defense might injure the other party. Some courts because of this possible injury, refuse all such amendments (127); but probably most courts take the more rational position that such an amendment will not be refused, unless under the circumstances of the case in hand it would actually injure the other party, in the way just explained or in some other way (128).

§ 112. Same: Pleading wholly bad in substance.

(127) Thayer v. Farrell, 11 R. I. 305.
(128) New River Co. v. Painter, 100 Va. 507.

Another limitation upon amendments, which has had considerable following, is that, when no cause of action or defense is stated, the pleading thus defective can not be amended so as to state one (129). The reason for this rule is much the same as that which forbids an entire change of cause of action or defense. One might file a suit with a declaration so defective as to mean little or nothing. After the filing of the suit, the statute of limitations might become a bar to some cause of action which the plaintiff has. Then, later, the plaintiff might desire to amend this worthless declaration so as to sue on his cause of action and thus to avoid the statute of limitations. The danger of injuries to the other party, in this kind of case, is certainly less than where one cause of action is changed into another; and, clearly, the rule forbidding the making good of a bad declaration should only be applied when permitting such an amendment would actually injure the other party.

(129) Foster v. Hospital, 191 Ill. 94.

CHAPTER IV.

DILATORY PLEAS.

§ 113. **In general.** When dilatory defects do not appear upon the face of the declaration, so as to be objected to by a demurrer they must be set up by a plea or pleas (§ 90, above). For the most part, the same principles that govern the pleading of defenses in substance apply also to the pleading of dilatory defenses. Dilatory pleas may be traverses, or pleas in confession and avoidance, and all the general rules which apply to traverses and confession and avoidances apply to these dilatory pleas. But there are some special regulations about dilatory pleas which we must notice in passing.

§ 114. **Effect of judgment on dilatory pleas.** When issues of law or fact are raised on pleadings which go to the merits, the judgment no matter for which party it is given, is final (1). But in the case of dilatory pleas this is not always so. We may summarize the law upon this point: If the defendant wins upon a dilatory plea, the judgment is that the writ be quashed (2). This means that that particular suit is lost, but the plaintiff is at liberty to bring a fresh suit, avoiding the objection which made the first suit defective. The ability of the plaintiff

(1) Ellis v. Staples, 9 Humphrey (Tenn.) 238.
(2) McKinstry v. Pennoyer, 2 Ill. 319.

to bring a fresh suit shows us why these pleas were called dilatory pleas. They simply delay the plaintiff. His recovery is put off for such length of time as it takes him to get his suit started again. The grounds of dilatory pleas which will thus delay the plaintiff have already been discussed in §§85-89. If the plaintiff wins on a dilatory plea, that is, overthrows the dilatory plea of the defendant, the kind of judgment that he gets depends upon whether the issue raised, upon which he won, was one of law or of fact. If the dilatory plea was demurred to and the plaintiff won, the judgment is that the defendant answer over (3). The effect of this judgment is that the dilatory plea is considered as thrown out of the record, and the defendant must plead just as if he had previously failed to plead entirely. If, however, the plaintiff wins on a denial or traverse of a dilatory plea, the judgment is that the plaintiff recover (4). In this one case of decision on a dilatory plea the judgment is final. The reason for making the judgment final in this case is that the courts considered it only fair that the plaintiff should have a final judgment, when the defendant had put the plaintiff to the expense and trouble and delay of a jury trial concerning the truth of this dilatory plea, and yet the defendant had failed to win. The idea seems to be that, if the defendant wishes to rely upon a dilatory defense, he should certainly pick a truthful one, or else lose the case if the plaintiff traverses and disproves the defense.

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(3) Cravens v. Bryant, 3 Ala. 278.
(4) Straus v. Weil, 5 Coldwell (Tenn.) 120.

§ 115. **Other rules concerning dilatory pleas.** The common law requires that dilatory pleas should be pleaded before pleas in bar (5). Pleas in bar are those which set up defenses to the merits of the plaintiff's case. Indeed, the rule of the common law required pleas to the jurisdiction to be put in before other dilatory pleas, and there are some other detailed rules as to the order in which dilatory pleas must be pleaded, but they are mostly obsolete and beyond the scope of this discussion.

Another thing to be kept in mind is that dilatory defenses are never available upon the general issue (6). The general issues are pleas in bar, and therefore, of course, they cannot raise dilatory defenses.

Finally, dilatory pleas must, as the phrase goes, "give the plaintiff a better writ." This means that the defendant, in his dilatory plea, must show the plaintiff how to avoid the dilatory objections when he brings his new suit for this same cause of action. Thus, in a dilatory plea objecting to the jurisdiction of the court, it must be indicated in what court the suit should be brought (7). In a dilatory plea on the ground of non-joinder of plaintiffs, the defendant must point out what persons ought to be joined as plaintiffs (8). The same principle applies to all dilatory pleas.

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(5) Allen v. Watt, 69 Ill. 655.
(6) Henderson v. Hammond, 19 Ala. 340.
(7) Lawrence v. Smith, 5 Mass. 362.
(8) Wadsworth v. Woodford, 1 Day (Conn.) 28.

PART II.

CHAPTER V.

EQUITY PLEADING.

Section 1. The Bill.

§ 116. **Two functions of the bill.** The bill in equity corresponds to the declaration at common law; but it has one very great difference. It is not only an allegation of the facts constituting the plaintiff's cause of action, but it is also an examination of the defendant as a witness. This double function of pleadings in equity is peculiar to that system, and has not been without its drawbacks. At one time in the history of ecclesiastical pleading out of which equity pleading grew, the examination of the witnesses was also included in the bill. But fortunately this anomaly never gained a real foothold in equity pleading proper.

§ 117. **Same: Charging part.** This use of the bill as an examination of the defendant has led to the introduction into the bill of two so-called parts of the bill, which have little place in a real pleading. The first of these is called the *charging* part. This part of the bill, so far as

it serves the purpose we are now speaking of, is a statement of the evidential facts which the plaintiff relies upon to prove his ultimate facts which constitute the cause of action. The object of alleging these evidential facts is to compel the defendant to give, in detail, all the knowledge he has in favor of the plaintiff's case. If the ultimate facts alone were alleged in the bill, as would be the case in a declaration at common law, the defendant might make his answers vague and general and thus evade a complete examination. The plaintiff, therefore, sets forth the detailed evidential facts to compel to complete disclosure by the defendant. The rule is that the defendant must answer fully to all facts ultimate or evidential, which are stated in the bill; so the plaintiff's purpose is accomplished (1). This charging part of the bill is also used for another purpose of which we shall speak later (§ 130, below).

§ 118. **Same: Interrogating part.** The other part of the bill, which its use as an examination has introduced, is the *interrogating* part. This may consist of a general interrogatory, which demands that the defendant answer fully all the facts alleged in the bill, with all their details and attendant circumstances. This is sufficient to compel the defendant as a matter of law to disclose his information completely, but, in practice, it was found that the defendant still found means to evade a complete answer. The device of special interrogatories was therefore introduced to overcome this difficulty. Special interrogatories consist of a great number of questions which

(1) Bank v. Levy, 3 Paige (N. Y.) 606.

the defendant is to answer, and which interrogate him in detail as to all the facts alleged in the bill. It has sometimes been said that an equity bill is a tale thrice told. The truth of this is now apparent. The tale is first told in the statement of the ultimate facts set forth to show the cause of action. The tale is told again in the evidential facts set forth in the charging part of the bill; and it is told for the third time, in still greater detail, in the special interrogatories. One can easily see how an equity bill could run to a great length. These defects are all due to the mixing of the examination of the defendant with the pleading proper. Obviously, the procuring of evidence should have been wholly left to a later and separate stage of the proceedings.

§ 119. **The parts of the bill.** An equity bill is supposed to consist of nine parts as follows: 1. Address. 2. Introduction. 3. Statement. 4. Confederating part. 5. Charging part. 6. Jurisdiction clause. 7. Interrogating part. 8. Prayer for relief. 9. Prayer for process (2). We may notice these briefly in order. The *address* is simply the direction of the bill to the court in which the plaintiff wishes to start his suit. In England it would customarily read "To The Honorable Lord High Chancellor of Great Britain;" in the Federal courts it may read "To The Honorable, the Judges of the Circuit Court of the United States for the Eastern District of Virginia, Sitting in Equity." The *introduction* of the bill simply states the plaintiffs' names and addresses. The object of requiring the addresses of the plaintiffs to be stated was

(2) Mitford & Tyler's Equity Pleading, 139-145.

to enable them to be found for the purpose of collecting any costs assessed against them (3). By the United States equity rules, promulgated by the Supreme Court under the authority of an act of Congress, the introduction must also contain the names and addresses of the defendants (4). The *statement* is that part of the bill which alleges the ultimate facts which constitute the cause of action (5). This differs in no way from the corresponding allegations in a declaration at common law. Of course, the facts necessary to state an equitable cause of action will vary widely from those necessary to state a legal cause of action.

§ 120. Same (continued). The *confederating part* was simply a charge that the defendants were combining together, and with other persons unknown, to injure and oppress the plaintiff and to refuse to perform their legal obligations to the plaintiff. This part of the bill is wholly unnecessary, does not have to be proved, and, indeed, in many if not in most cases, is wholly immaterial (6). The *charging part* of the bill contains the allegations of evidential facts as we have already seen (§ 117). The *jurisdiction clause* is simply a statement that the defendants have done the plaintiffs great wrongs, for which the plaintiffs have no remedy at common law, and will be wholly without relief unless the court of equity will grant them relief. This clause is entirely useless. The facts alleged in the statement must show a case where there is

(3) Sandys v. Long, 2 Mylne & Keen, 487.
(4) Harvey v. Richmond, 64 Fed. 19.
(5) Barnard v. Cushman, 35 Ill. 451.
(6) Stone v. Anderson, 26 N. H. 506.

no adequate remedy at common law, in order to show an equitable cause of action. If the statement does not contain such facts, the jurisdiction clause will not take their place, because it is a mere allegation of law; and, if the statement does contain such facts, the jurisdiction clause is purely superfluous (7). The *interrogating part* of the bill we have already noticed (§ 118).

§ 121. **Same: Prayers for relief and process.** The *prayer for relief* is a feature of the equity bill which is not found in the common law declaration. No relief will be granted which is not prayed for in the bill (8), except in the case of a suit brought for the benfit of charities or infants (9). Prayers for relief are either general or special. A general prayer simply asks the court to give the plaintiff such relief as the nature of his case shall require, and as shall be agreeable to equity. A special prayer, demands some specific relief. If a special prayer alone is used, only the relief prayed can be granted. On a general prayer, any relief warranted by the case made by the bill may be granted. When a special prayer and a general prayer are joined, as they customarily are, the special relief prayed may, of course, be granted, as well as any additional relief which is within the scope of the bill and which is consistent with the special relief prayed (10). Indeed, it is now quite commonly held that in this case the relief granted under the general prayer need not neces-

(7) Goodwin v. Smith, 89 Me. 506.
(8) Driver v. Fortner, 5 Porter (Ala.) 9.
(9) Stapilton v. Stapilton, 1 Atk. 2.
(10) Walpole v. Oxford, 3 Ves. 402, 416.

sarily be consistent with the special relief prayed (11). In some cases, preliminary relief, such as an ex parte injunction, cannot be granted without being specially prayed for (11). The *prayer for process* asks that the court may order subpoenas to be issued, commanding the various defendants to appear and answer the bill and conform to any orders or decrees of the court. In this part every defendant must be named, or he is not a party to the bill (12). This part came to be introduced because the bill was a petition to the king, or to the chancellor representing the king, to take jurisdiction of the case by commanding the defendants to appear, and to grant the plaintiff extraordinary relief which he could not get at common law.

§ 122. **Statement of the cause of action.** There are no forms of action in equity, so that the various causes of action in equity are not classified but are all proceeded upon in one form. This is somewhat analogous to the way in which a great number of these causes of action are bundled together in the action on the case at common law (§ 43, above). Defamation, deceit, and negligent injury to one's person are extremely dissimilar causes of action. Equally dissimilar are the causes of action in equity, but no difference in the method of proceeding upon them is made. Facts may be alleged in an equitable bill, either positively or upon information and belief (13). Evidence must not be alleged any more than at law (14), but,

(11) Crain v. Barnes, 1 Md. Ch. 151, 6.
(12) Hoyle v. Moore, 4 Ired. Eq. (N. C.) 175.
(13) Campbell v. Ry. Co., 71 Ill. 611.
(14) Wilson v. Eggleston, 27 Mich. 257.

as we have seen, in the charging part of the bill evidence commonly is alleged in order to obtain a full disclosure from the defendant. Allegations of law must be avoided, just as in a common law declaration. The time and place when each fact occurred, which has to be alleged at common law to make the pleading good in form, need not be stated in equity unless they are material. Facts judicially noticed need not be set forth. Incorporation by reference is allowed under liberal limitations (15). Hypothetical pleading and recitals, as distinguished from statements of facts, are bad (16). Pleadings are construed against the pleader as at common law (17). The equity bill is never divided into counts, as is a common law declaration. Several causes of action may be included in one bill. The only limitation seems to be that you cannot include two causes of action, when the law requires the plaintiff to elect between them. When one must elect between causes of action is not a question of pleading. It may be said in general, that election is required when the two causes of action require the plaintiff to take two positions which are inconsistent with each other (18). For example, one cannot join an action to rescind a contract for fraud and an action to specifically enforce the same contract. In one action he would be asserting the invalidity of the contract, and in the other its validity. The right to join several causes of action in

(15) Harvey v. Kelly, 41 Miss. 490.
(16) Gram v. Stebbins, 6 Paige (N. Y.) 124.
(17) Tate v. Evans, 54 Ala. 16.
(18) Moog v. Talcott, 72 Ala. 210.

one bill is also limited by the rule against multifariousness which will be discussed next.

§ 123. **Multifariousness: In general.** At common law each case is in theory a dispute between two persons as to a single legal right. The permission to use several counts often resulted in several such cases being drawn into one, but these several cases were still kept quite distinct. The theory of equity procedure is just the opposite. The desire of a court of equity is to make the case cover all possible controversies with regard to the matter in hand. Therefore, as a general rule, all persons interested in the object of the suit must be made parties to the proceeding, so that every right concerning the matter may be passed upon and adjudicated in the one suit (19). The idea is that in this way the court avoids a multiplicity of suits. On the other hand, the court must avoid getting such a medley of matters on one record as will confuse the defendants as to just what causes of action are involved, or as will result in bringing some parties into a case, who are interested in only a very small part of the matters to be litigated. It is plainly largely a matter of discretion, whether the various causes of action may be united without leading to unfortunate results. If they may the bill is not multifarious; if they may not, it is multifarious.

§ 124. **Same: Separate causes of action.** Multifariousness often consists of joining totally separate causes of action, even though they exist between the same par-

(19) Rexroad v. McQuain, 24 W. Va. 32.

ties on both sides. The court generally holds that entirely separate causes of action cannot be joined (20). Such a joinder would not be a settling of all of *one* matter in the suit, which is the object of equity, but would be a settling of *several independent* matters to which the general principle does not extend. If, however, the several causes of action have some connecting link, which binds them all into what is practically a single situation, then they may be joined. Suppose the defendant was the trustee of two funds for the benefit of the plaintiff. Suppose the two trusts to be entirely separate and created at different times. Plainly, the plaintiff's rights against the defendant with regard to these two trusts, in case the defendant failed to perform his duties as trustee, would be totally separate causes of action. But, if the provisions of the trusts required that they should contribute to the plaintiff's maintenance in certain proportions, there can be no doubt that this would form such a connecting link as would permit these separate causes of action to be joined in one suit (21).

§ 125. **Same: Separate actions arising from single act.** Another form of multifariousness occurs when a number of persons, all having separate rights against the defendants, join in a suit against him (22). Here again if such a joinder were allowed, the court would not be settling all of one subject matter in one suit, but would be settling several subject matters. If, however, the

(20) Hayes v. Dayton, 8 Fed. 702.
(21) Campbell v. Mackay, 1 M. & C. 619.
(22) Winslow v. Jenness, 64 Mich. 84.

causes of action in favor of all the plaintiffs, though distinct, all arose out of a single wrongful act by the defendant, they may be joined. The advantage of litigating the question of the defendant's wrong once for all, overcomes the objections against joining distinct causes of action. Thus, if A, B, and C own homes in a certain neighborhood, and the defendant by a nuisance injures these homes, the three parties may join to restrain the nuisance (23).

Section 2. The Answer.

§ 126. Answer as discovery. We saw that the bill includes the cause of action and the examination of the defendant. The answer likewise, has a double function. It states, first, the defenses of the defendant; and second, it contains his answers to all the facts stated or charged in the bill, and to the interrogatories in the bill, if any. Of course, the defendant need not answer as to the same matter more than once. If the interrogatory covers the point, he need not answer to the statement of that point contained in the stating part or charging part of the bill.

The answers of the defendant to the statements, charges, and interrogatories of the bill are called discovery. They are evidence in the case which may be used at its hearing, and they are evidence which is given more than usual weight. The discovery in the answer is conclusive against the defendant, so that any fact which the defendant admits in his answer need not be proved by the plaintiff in any other way (24). The answer is not only

(23) Murray v. Hay, 1 Barb. Ch. (N. Y.) 59.
(24) Pugh v. Mining Co., 112 U. S. 238, 40.

conclusive proof in favor of the plaintiff, but it is also quite strong evidence for the defendant. Any fact stated in the answer, by way of discovery, must be taken as true in favor of the defendant, if it counts in his favor, unless the plaintiff brings evidence more than equal to the testimony of one witness, contradictory of the fact (25). Equity did not permit the plaintiff to waive all discovery by the defendant, and thus to take away from the defendant this advantage of having his statements in the answer count as rather strong evidence in his own favor (26). But statutes now generally provide that the plaintiff may waive an answer under oath, and that, if he does, the defendant's answer shall be treated as a pleading only, and not as discovery (27).

§ 127. **Answer as a pleading.** At common law we saw that the defendant may either deny the allegations of the declaration, or confess and avoid them. In an equity answer no denials are necessary. Every fact alleged in the bill, which is important as constituting the cause of action, is denied by the answer unless expressly admitted (28); so the answer as a pleading contains only defenses by way of confession and avoidance. A general traverse of the bill is indeed commonly included in every answer, but it is no doubt unnecessary. What are defenses in confession and avoidance is determined by the same principles as should have been applied at common law, and as would have been applied but for the illogical exten-

(25) Cooke v. Clayworth, 18 Ves. Jr. 12.
(26) Codner v. Hersey, 18 Ves. Jr. 468.
(27) U. S. Equity Rules, No. 41.
(28) Smith v. Ewing, 23 Fed. 741.

sions of the various general issues. The facts constituting the prima facie cause of action must be alleged in the bill, and are put in issue without any pleading by the defendant, as already explained. But any fact constituting a defense, which is consistent with the truth of all the facts stated in the bill, is a defense by way of confession and avoidance, and must be affirmatively stated in the answer (29).

§ 128. **Same (continued).** Several defenses may be set up in the answer (30). There was no objection on the ground of duplicity. No defenses can be proved except those alleged (29). Statements of evidence are to be avoided, as elsewhere in pleading, but this rule is difficult to enforce when an answer contains discovery, which is, of course, sure to run into details. Allegations of law are likewise to be avoided. The various defenses set up in an answer must not be absolutely inconsistent in fact, but this rule is of infrequent application (31). Repugnancy of allegations is, of course, to be avoided (31). As in the bill, so in the answer, facts relied upon may be alleged either positively or on information and belief. An answer is not essential, if the plaintiff has waived discovery, for the defendant need set up no defenses in confession and avoidance unless he so desires. If no answer is put in, the case has to be tried simply on the question of the truth of the allegations contained in the bill which constitute a prima facie case.

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(29) Miller v. Miller, 25 N. J. Eq. 354.
(30) Stone v. Moore, 26 Ill. 165.
(31) Ozark Co. v. Leonard, 24 Fed. 660.

Section 3. The Plea.

§ 129. Origin and object of the plea. At a very early day, it seemed to be thought unfair to make the defendant give his testimony in his answer to the bill in every case. The plaintiff might have absolutely no cause of action at all against the defendant, but, by alleging facts wholly untrue, he might file a bill stating a cause of action. The defendant, if compelled to answer, would have to disclose many facts, possibly facts which for business reasons he would wish to keep private. To compel this disclosure, in favor of a person who has no claim upon the defendant at all, evidently would be wrong. To avoid this, pleas were introduced (32). The idea of the plea was taken from common law pleading. Many of the features of the equity plea are to be traced to common law pleading. In a plea, the defendant need give no discovery at all. A plea, then, is purely a pleading, and not in any way mixed up with the obtaining of evidence, as the bill and answer are (33).

Since, by use of a plea, the defendant could avoid discovery, why would he not use a plea in every case? The reason was that a plea could only be used when the defendant had a single clear defense, upon which he was willing to rely to defeat the plaintiff (34). If the defendant desires to rely upon two or more defenses, or if his defense is one which depends, for its allowance, largely on the discretion which cannot well be exercised

(32) Langdell, Equity Pleading (2d ed.), sec. 93.
(33) Farley v. Kitson, 120 U. S. 303, 317.
(34) Rhode Island v. Massachusetts, 14 Peters, 210, 259.

without a careful consideration of the facts by the court, a plea will not serve his purpose; he will be driven to answer and to give discovery.

§ 130. **Pure, negative, and anomalous pleas.** A *pure* plea is one which sets up an affirmative defense; that is, a defense in confession and avoidance. A *negative* plea is one which denies some necessary allegation of the case stated in the bill. It will be noticed then, that in a plea denials exist as defenses. In an answer, we say that all facts not expressly admitted are denied. Pleas, however, following the common law analogies, as it is stated above they often do, admit everything which is not expressly denied (35). An *anomalous* plea is one which is both a denial and a confession and avoidance. A plea must contain but one defense, as has been stated. This anomalous plea, then, can be used only in a case where a denial and a confession and avoidance are both necessary to make one defense. This case arises only where the plaintiff introduces into his bill an anticipatory replication.

§ 131. **Anticipatory replications.** In equity, the alleging of an anticipatory replication in the bill is perfectly regular (36). At one time, special replications to an answer were permitted. But this practice fell out, and it came to be the rule, that, if the plaintiff has a replication to some defense which the defendant is likely to set up, he must put that replication in the bill. If he does not do it in the first place when he draws up his bill later, after the defendant pleads the defense, he will have

(35) M'Closkey v. Barr, 38 Fed. 165, 171.
(36) Tarleton v. Vietes, 6 Ill. 470. Compare § 61, above.

to amend his bill to set up the replication. Replications in equity have become mere formal pleadings, simply stating that the answer or plea is untrue. They serve the plaintiff's purpose, therefore, when he simply wishes to deny the defense or defenses set up in the answer or plea (37). But if he wishes to meet any defense of the defendant by a replication in confession and avoidance, he must put that confession and avoidance in the bill, either originally or by amendment, in the form of an anticipatory replication. The anticipatory replication is placed in the charging part of the bill (38). This is the other purpose of the charging part to which reference was made in discussing the bill (§ 117).

§ 132. **Use of anomalous pleas.** An anomalous plea is used to set up a defense to which the plaintiff has pleaded an anticipatory replication in the bill. Suppose the plaintiff files a bill for the specific performance of a contract, and that he thinks the defendant will rely upon the statute of limitations; whereas, by a new promise, the defendant has so waived the statute of limitations as to prevent its being a defense. In such a case, the plaintiff in his bill will allege in the charging part that the defendant pretends that six years (or such other time as the statute prescribes) has elapsed, since the breach of the contract, and that therefore, he, the defendant, is not liable to perform it; whereas, in truth, within three years before the beginning of this suit, the defendant made a promise to carry out the contract fully. Thus the plain-

(37) Cushman v. Bonfield, 139 Ill. 219.
(38) Smith v. Clark, 4 Paige (N. Y.) 368.

tiff sets up an anticipatory replication. If the defendant now wishes to plead the statute of limitations in a plea, he must set up the running of the statute in confession and avoidance, and also deny the making of the new promise. Neither of these alone would serve his purpose. If he simply sets up the running of the statute, without denying the new promise, he thereby admits the new promise, and so that the statute is no defense. As has just been stated, a plea admits every fact not expressly denied. On the other hand, if he denies the new promise, without setting up the statute of limitations in confession and avoidance, he cannot rely upon the defense of the statute because he has not pleaded it. Such a plea then, must be both a confession and avoidance and a denial, and is therefore called an anomalous plea (39).

§ 133. **Answers in support of pleas.** When a plea is put in, the defendant cannot always avoid giving any discovery. The plaintiff is entitled to have the defendant's testimony, so far as it may bear upon the truth of the plea. The defendant need not give any discovery as to any matters not involved directly in the plea, but, as to that defense which is set up in the plea, he must give discovery in many cases. Let us consider first a pure plea. This plea sets up an affirmative defense. Quite often there will be nothing in the bill as to this defense at all. If such is the case, the defendant need give no discovery concerning it, for the defendant need give no discovery except as to facts alleged in the bill. But the plaintiff in his bill may state that the defendant pretends that there

(39) Allen v. Randolph, 4 Johns. Ch. (N. Y.) 693.

is such a defense, and may charge that the defense is false, and further charge evidential facts inconsistent with the truth of the defense. In such a case, the defendant must give discovery as to these evidential facts charged (40). They relate to the truth of the pleading, and they are alleged in the bill, and so they come within the principles we have just seen. Thus, if the defendant relies on fraud as a defense, and the plaintiff charges that there was no fraud and further that the defendant knew every fact, which would show the impossibility of fraud; the defendant, when he pleads fraud, would have to give discovery as to his knowledge of all the facts at the time of making the contract. This discovery is not put into the plea, but is given in what is called a *supporting* answer. This answer is evidently a very limited one and is filed with the plea.

§ 134. **Same: Negative and anomalous pleas.** In the case of a negative plea, a supporting answer is required if there are charges of evidential facts in the bill tending to prove the fact denied by the plea. On principle, it would seem, that, since the fact denied by the plea is itself alleged in the bill in the stating part, a supporting answer giving discovery as to this fact would be necessary in every case. But the law requires a supporting answer only when there are charges of evidence tending to prove the fact in question (41).

In the case of an anomalous plea, a supporting answer is required, giving the defendant's evidence concern-

(40) Radford v. Wilson, 3 Atk. 815.
(41) Rhino v. Emery, 79 Fed. 483.

ing the fact alleged in the anticipatory replication in all cases. Thus, in the case above, where the defendant in an anomalous plea sets up the statute of limitations and denies the new promise, a supporting answer giving discovery as to the new promise would be necessary. Besides this, if there are charges of evidential facts in the bill inconsistent with the affirmative defense which the defendant sets up, the supporting answer must give discovery as to these evidential facts. And further, if there are charges of evidential facts tending to prove the anticipatory replication alleged in the bill, the defendant's supporting answer must set forth the defendant's knowledge as to these evidential facts also (42).

§ 135. **Answer overruling plea.** A plea will be destroyed, if the defendant along with the plea puts in an answer setting up any defense to the bill. We are here assuming that the plea covers the whole case made by the bill. If they are to different parts of the bill the answer never overrules the plea. If an answer is put in to the whole bill, or to the same part as the plea is, the law considers that the plea has become useless and therefore overrules it (43). The object of the plea, as already stated, is to avoid giving discovery concerning matters set forth in the bill, in cases where the giving of such discovery would be undesirable. If the defendant puts in an answer setting up defenses, he must give discovery as to the whole bill (44). The use of the plea to avoid giv-

(42) Dwight v. Ry. Co., 9 Fed. 785.
(43) Bolton v. Gardner, 3 Paige (N. Y.) 273.
(44) Champlin v. Champlin, 2 Edw. Ch. (N. Y.) 361.

ing discovery is made senseless, when the defendant puts in an answer in which he has or may be compelled to give full discovery. But, of course, an answer which sets up no defenses, and simply gives such discovery as the defendant is bound to give in a supporting answer, does not have the effect of destroying the plea (45). Suppose the defendant, in his supporting answer, gives some discovery which is unnecessary according to the rules for a supporting answer. The law is then that the answer destroys the plea (46). By giving unnecessary discovery, the defendant, it is said, has shown that he has no objection to giving discovery, and thus has indicated that he does not need the protection of a plea. The plea will therefore be overruled, and the defendant compelled to answer. The defendant may put in a plea to part of the bill, and an answer to the remainder. If these two pleadings go to distinct parts of the bill, the answer does not overrule the plea. The defendant, it is thought, in that case is attempting to protect himself from discovery as to so much of the case made by the bill as he can, and has simply answered the residue of the bill. But, if the answer covers any portion of that part of the bill to which the plea applies, it overrules the plea (47). The obvious ground of this is that the defendant has shown himself willing to give discovery concerning the matters to which the plea applied, and therefore does not need the protection of the plea.

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(45) Clayton v. Earl, 3 Y. & C. 683.
(46) Bell v. Woodward, 42 N. H. 181, 193.
(47) Thring v. Edgar, 2 Sim. & St. 274, 281.

§ 136. **Other rules about pleas.** Any defense that may be set up in a plea may also be set up in the answer, with the exception of dilatory defenses (48). Under the United States equity rules, any defense except dilatory defenses may be set up in the answer, with the same effect with regard to discovery as if set up in the plea (49). This means that instead of using a plea, the defendant may, if he wishes, set up his defense in what is called an answer, and give no more discovery than he would have to give in an answer supporting a plea. Thus the need for pleas to protect the defendant from full discovery is abolished in the Federal courts. The only remaining need for a plea in those courts is to set up dilatory defenses. A plea will be sustained so far as it is good, and overruled so far as it is bad (50). This is contrary to the common law rule about pleas (§ 65, above). There a plea must be wholly good or it is considered entirely bad. As at common law, pleas must not be argumentative, uncertain, or too narrow. Dilatory pleas, as at common law, must show how the dilatory objection can be avoided (51). When a plea is held bad on argument, a final decision is not rendered, but the defendant is ordered to put in an answer (52). The object of a plea is to avoid answer, and, if the plea is bad, the natural judgment is that the defendant must answer. If a plea is held good, that simply decides that the defense will prevail, if proved;

(48) Wood v. Mann, Fed. Cas. 17,952.
(49) U. S. Eq. Rules, No. 39.
(50) French v. Shotwell, 5 Johns. Ch. (N. Y.) 554, 561.
(51) Neely v. Newman, 77 Fed. 787.
(52) Bush v. Bush, 1 Strobhart (S. C.) 377.

but the plaintiff must then put in a replication denying the plea, and the truth of the plea is then to be determined, so that here again no final decision is rendered. However, when the truth of the plea has been put in issue and decided one way or the other, the decree of the court is final: either that the plaintiff recover, or that his bill be dismissed (53). This rule has been changed by the United States equity rules to the extent of allowing the plaintiff to object to the validity of a plea which has been found true, when he had not previously objected to it (54).

Section 4. Demurrers.

§ 137. Various methods of objecting to pleadings: Bills. In courts of equity, objections to pleadings are made in a greater variety of ways than at common law. A demurrer lies only to the bill. Defects in a plea or an answer must therefore be taken in other ways, and even some defects in the bill were not taken by demurrer. Irregularity in the filing of the bill, as where it was filed without authority from the plaintiff; or without leave of the court, when that is necessary; or without giving security for costs, in cases where that is essential; and sometimes informality in the language of the bill; were all taken advantage of by motions (55). Again, the presence of irrelevant matter in the bill, which in equity is called *impertinence,* and, of course, the presence of irrelevant matter which is defamatory, which in equity is

(53) Adriaans v. Lyon, 8 D. C. App. 532.
(54) U. S. Eq. Rules, No. 33.
(55) Grimes v. Grimes, 143 Ill. 550.

called *scandal,* was objected to neither by demurrer nor by motion, but by exceptions to the bill insisting that such irrelevant matter should be eliminated (56).

§ 138. **Same: Answers and pleas.** The validity of a plea was tested, not by a demurrer as at common law, but by setting the plea down for argument (57). This, of course, is little more than another name for the same thing. Irregularity or informality in a plea was objected to by a motion. The validity of an answer could be questioned only by setting the case down for a hearing on bill and answer. This was somewhat different from a demurrer. The case was finally decided on this hearing, just as on any other hearing of the case in equity. The bill was to be considered true, only to the extent that the discovery in the answer proved it to be true. Therefore, even if the answer is bad, it is unwise for the plaintiff to set the case down for a hearing on bill and answer, unless his bill is sufficiently proved by the answer, for, if he does so, he will lose even though the answer be bad (58). As this would not often be the case, it is generally impossible for the plaintiff to test the validity of the answer as a defense, until the regular hearing of the case. At the hearing, the court will, of course, refuse to make a decree for the defendant on proof of an answer which is insufficient. Objections to the answer for irregularity or informality are taken by motion. If the answer does not give sufficient and full discovery, it is objected to by ex-

(56) Woods v. Morrell, 1 Johns. Ch. 103, 106.
(57) Spangler v. Spangler, 19 Ill. App. 28.
(58) Crowe v. Wilson, 65 Md. 479.

ceptions (59). Exceptions, therefore, are chiefly used for two purposes in equity: first, to cut out of pleadings impertinence and scandal; second, to insist that the defendant put into his answer sufficient discovery.

§ 139. **Origin and use of demurrers.** Demurrers, like pleas, were introduced into equity pleading from the common law. Again, like pleas, the object of the demurrer was to protect the defendant from having to give discovery in an answer. A plea was used for this purpose, where the difficulty in the plaintiff's case did not appear upon the face of the bill. But if, on the plaintiff's own showing in the bill, his case was defective, the reasons for not compelling the defendant to give discovery, and thus to disclose facts which for business reasons or private reasons he might desire to keep secret, were all the clearer. In such a case, therefore, the defendant was permitted to demur (60). This being the object of the demurrer, we can see why demurrers to the plea or to the answer were not introduced. The answer called for no discovery from the plaintiff. The plea called for no discovery from the plaintiff. Therefore, the plaintiff could not demur to protect himself from discovery (61).

§ 140. **Kinds of demurrers in equity.** In equity there are general and special demurrers. A general demurrer, so called, simply states that the bill sets forth no cause of action in equity. Under it the defendant is entitled to insist that the plaintiff either has no cause of action at all,

(59) Fuller v. Knapp, 24 Fed. 100.
(60) Judson v. Stephens, 75 Ill. 255.
(61) Crouch v. Kerr, 38 Fed. 540.

and therefore none in equity, or that the plaintiff has adequate remedy at law, and therefore no cause of action in equity (62). All other demurrers, whether for dilatory defects or for formal defects, must specially state the defect or defects relied upon (63). But the rule that the so-called general demurrer did not cover dilatory or formal defects was considerably modified by the permission to demur ore tenus (orally). Demurring ore tenus means setting up a ground of demurrer at the hearing on the demurrer, which was not stated in the demurrer at all. This could be done according to the equity practice, subject to some limitations too detailed for our notice. The only objection to putting in a general demurrer, and then demurring ore tenus at the hearing of the general demurrer, is, that if the defendant wins on the demurrer ore tenus he has to pay the costs of the demurrer (64).

§ 141. **Other rules about demurrers.** Just as a plea or an answer may be put in to part of the bill only, the rest of the bill being pleaded to in some other way, so a demurrer may be filed to part of the bill (65). The failure to demur cures all defects in the bill, except the lack of a cause of action within the general jurisdiction of the court. If the demurrer covers more of the bill than is objectionable, it is overruled entirely (66). This the reader will remember is in accord-

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(62) Cochrane v. Adams, 50 Mich. 16; Richards v. Ry. Co., 124 Ill. 516.

(63) Day v. Cole, 56 Mich. 295.

(64) Robinson v. Smith, 3 Paige (N. Y.) 222.

(65) Powder Co. v. Works, 98 U. S. 126.

(66) Snow v. Counselman, 136 Ill. 191, 198.

ance with common law principles, but contrary to the rule applied to pleas in equity (§§ 65-68, 136, above). But the more liberal doctrine applied to pleas in equity is applied to a demurrer by two or more defendants (67). If the demurrer is good as to one defendant and bad as to another, it will be overruled as to the first and sustained as to the second. A demurrer will be destroyed by a plea or an answer covering the same part of the bill to which the demurrer is filed (68). This is on the same theory that an answer overrules a plea, when it covers the same part of the bill that the plea is intended to meet. In general, the rules of the common law which apply to demurrers apply also to demurrers in equity. The judgment on a demurrer is not final in courts of equity. It never was final when given for the plaintiff; that is against the demurrer. The object of the demurrer, as has been stated, is to protect the defendant from discovery. If the demurrer is bad, the defendant has no protection and must give discovery by an answer. So, if the demurrer is overruled, the judgment is that the defendant answer (69). If the demurrer is sustained, the original rule in equity was that the defendant got a final judgment. But, just as at common law, the original strictness was gradually departed from, until finally the rule became in substance that, when a demurrer is sustained, the plaintiff may amend his bill and proceed with the case (70).

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(67) Mayor v. Levy, 8 Ves. Jr. 403.
(68) Jarvis v. Palmer, 11 Paige (N. Y.) 650, 657.
(69) Forbes v. Tuckerman, 115 Mass. 115, 119.
(70) National Bank v. Carpenter, 101 U. S. 567.

Section 5. Discovery.

§ 142. Discovery as incidental to equity suits. Discovery, as we have seen, means the testimony of the other party. The defendant's testimony was given in his answer to the plaintiff's bill. If the defendant wished to obtain the testimony of the plaintiff, he filed a cross-bill against the plaintiff, containing charges and interrogatories, if he wished to use them, like the charges and interrogatories in the plaintiff's bill (71). Cross-bills, of course, were also used to set up causes of action in favor of the defendant against the plaintiff, connected with the subject matter of the plaintiff's bill. They were also used in case one defendant desired to set up a cause of action against another defendant, which ought to be litigated in the same proceeding in order to settle up all connected matters. The great limit upon discovery is that one party is not allowed to pry into the other party's case (72). The plaintiff may ask the defendant any question relevant to the plaintiff's case, but he may not ask the defendant about matters which have nothing to do with the plaintiff's side of the case, but simply tend to support the defendant's contention. Discovery might also be had of writings or documents in the possession of the other party (73). It was common in the charging part of a bill to state that the defendant has documents which are material to the plaintiff's case, and to ask for the contents of these documents or a specification of them.

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(71) Lupton v. Johnson, 2 Johns. Ch. (N. Y.) 429.
(72) Adams v. Fisher, 3 Myl. & Cr. 526, 546.
(73) Bird v. Harrison, 15 Ves. Jr. 408.

The rule that the plaintiff cannot pry into the defendant's case was most often applied when the plaintiff sought discovery of documents.

§ 143. **Pure bills of discovery.** So far we have spoken only of discovery, in connection with a bill which also sought to enforce an equitable cause of action against the defendant, but pure bills of discovery were also allowed (74). These were brought when the plaintiff was a party against the defendant in an action in another court, commonly a court of law, and in that action needed the testimony of the defendant. This he could not get in the common law court, because at common law parties to the case were incompetent to testify for themselves, and privileged against testifying for the other party. The comomn law rule about this has been almost entirely overthrown by modern statutes, but pure bills of discovery, of course, became established before these statutes were passed. When the plaintiff thus needs the testimony of the defendant in a suit at law, he files a bill in equity; seeking no relief against the defendant except discovery; stating simply the fact that an action is pending in a court of law, in which he needs to use the testimony of the other party; charging that the other party knows certain facts, and interrogating him with regard to them.

§ 144. **Same: What evidence may be obtained and from whom.** Discovery may be had whether it is absolutely essential or not. The fact that the plaintiff may

(74) Langdell, Equity Pleading (2d ed.), sec. 167 et seq.

have other evidence, by which he could possibly prove the facts, does not bar him from getting the evidence of the defendant (75). Discovery is evidence, and so it must be material, not privileged, and possibly competent (76). It is often held, however, that discovery will be required, although not competent evidence, its competency being left as an objection to its use at the trial of the case at law (77). Generally, only parties to the case can be asked for discovery. But, where corporations, who necessarily do their business exclusively through agents, or where individuals, who in fact do their business almost exclusively through agents, are the persons of whom discovery is asked, the rule is that the agents may be compelled to give discovery (78). Discovery by the corporation itself, it being a mere fiction, is obviously not satisfactory. Discovery by an individual who does his business through agents, and who would therefore have little or no personal information about the matter, would be almost equally useless. But this discovery given by agents is not evidence to the extent that discovery given by the parties themselves is (79).

§ 145. Modern statutory changes affecting discovery. The obtaining of discovery in equity by bill or cross-bill has become practically obsolete (80). Statutes have been passed making parties at common law or elsewhere com-

(75) Brereton v. Gamul, 2 Atk. 240.

(76) Shed v. Garfield, 5 Vt. 39, 41.

(77) Price v. Tyson, 3 Bland (Md.) 392, 406.

(78) Many v. Beekman Co., 9 Paige (N. Y.) 188.

(79) Wych v. Meal, 3 P. Williams, 310.

(80) Indeed in some jurisdictions pure bills for discovery are no longer allowed. Preston v. Smith, 26 Fed. 884, 889.

petent to testify for themselves and compellable to testify against themselves (81). Statutes have been passed compelling parties to produce documents (82). But the statutes just mentioned compel testimony or production of documents at the trial of the case. Discovery in equity was obtained before the trial. The defendant's answer is, of course, put in long before the hearing of the case. The plaintiff's answer to the defendant's cross-bill, if any, is also put in long before the hearing. If discovery is sought in equity, in aid of an action at law, it is obtained before the trial of the case at law. To be able to get the other party's evidence ahead of the trial of the case is, of course, a considerable advantage. It notifies one of the things he needs in proof, and enables him to decide on what points he must procure evidence. But even this advantage of discovery has been rendered obtainable at law, by statutes which permit parties to be examined before the trial of the case, and which require parties to produce documents for the examination of their opponents before the trial takes place (83). On testimony given at the trial, under the first set of statutes, there is no limitation at all like the old rule that one party cannot pry into the other's case. But in the statutes permitting examination of the other party and of his documents *before the trial,* this limitation is generally retained (84). The object of this is to prevent the possibility of one

(81) Wigmore, Evidence, secs. 576, 577, 2218.
(82) Wigmore, Evidence, sec. 1859.
(83) Wigmore, Evidence, secs. 1856, 1859.
(84) Wigmore, Evidence, sec. 1856

party finding out the evidence upon which the other party intends to rely, and in manufacturing evidence to meet it.

§ 146. **Same (continued).** The modern statutes previously referred to (85) which permit the plaintiff to waive an answer under oath, also have led to discovery becoming rare. If the plaintiff seeks discovery of the defendant he is bound, as we saw (86), by every statement of the defendant, unless he can disprove it by more evidence than the testimony of one witness. This is a very great risk to the plaintiff. If to prove some material fact he has but one witness, he runs the risk of losing his whole case by seeking discovery, for the defendant might deny that fact and the plaintiff would not have sufficient evidence to overcome the denial. This danger has induced most wise attorneys to waive discovery in all cases, so that all the law about discovery in the pleadings is now seldom called into practice. But the rules of equity pleading which govern the statement of the cause of action in the bill, and the statement of defenses in the answer, and the manner of objecting to defects in the bill or answer, are just as important as ever. It remains to add that pleas in equity are becoming obsolete. Since discovery is now seldom asked, the defendant does not need a plea to protect himself from it. Pleas, however, must still be used to set up dilatory defenses.

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(85) § 126, above.
(86) § 126, above.

PART III.

CHAPTER VI.

CODE PLEADING.

SECTION 1. GENERAL CHANGES FROM PRIOR SYSTEMS.

§ 147. Origin of code pleading. From an early day there was dissatisfaction with the systems of pleading which had grown up in law and equity respectively. When mere defects in form, even to misspelling of words, were grounds for a general demurrer, and for a final decision of the case and the barring of a new suit, it was evident that parties often lost just causes of action or were robbed of just defenses, through the most trivial errors in pleading. The statutes of jeofails, however, cured or made impossible most of these glaringly technical decisions. The growing liberality of amendment also tended in the same direction. A reversal of judgment, on appeal to the highest court of the state, for some error in pleading, when that error was one in substance, still remained possible. And such reversals, even though they were accompanied by a permission to amend and begin over again, nevertheless seemed very harsh. Also

the lawyers, out of great caution, drew up pleadings of greater and greater length, in order to include everything that past precedents could on any conceivable view make necessary. Thus pleadings became very prolix. The Latin names which were used to designate some of the pleadings, for example, the replication de injuria, seemed to give an air of scholasticism and over-nicety to the existing systems. Then, as we have seen, the wide scope of the general issue in several of the common law actions was injurious to the plaintiff, because he could not tell, when the defendant pleaded the general issue, what defenses the defendant expected to rely upon. Finally it often happened that a suit would be brought in equity, when it should have been brought at law, with the result that the proceedings in equity were wasted time, labor, and money, and the suit had to be begun over again at law (1). All these things led to a desire for a reform of the existing law of pleading. This desire for reform brought about the adoption of what is called Code Pleading by a large majority of American states and English jurisdictions. The exact territorial distribution of code pleading has already been stated (2). The first code was enacted in New York in 1848. That has been the original on which the American codes are all based, though with some deviations. The English code pleading is even more liberal and less technical than our American code pleading. In the limits assigned to the discussion of

(1) Cud v. Rutter, 1 P. Wms. 570.
(2) § 4, above.

code pleading we shall be compelled to confine ourselves to the general principles of the American system.

§ 148. **Union of law and equity.** As was stated in the last subsection, the separation of law and equity often proved very disadvantageous. It was not always easy to determine in which court a suit should be brought. The making of a mistake in this respect led, as we have seen, to delay and expense. Under the common law system attempts were made to mitigate this evil. These attempts took the form of statutes, providing that equitable defenses could be pleaded to actions at law (3). As generally interpreted, these statutes resulted in a rule which may be stated as follows: When the defendant in an action at law can go into equity and obtain a *perpetual* and *unconditional* injunction against the suit at law, he may plead the facts entitling him to such an injunction as an equitable defense in the legal action (4). But there were, of course, many cases where this very partial measure of relief did not apply, and where the separation of law and equity continued to work injustice. Obviously, the statutes just mentioned would not cure mistakes in choosing the wrong forum, mistakes which could be made so easily. The codes, practically without exception, provide for the complete union of actions at law and suits in equity (5). If the plaintiff brings a legal action, the defendant may use an equitable defense as he could under the statutes already mentioned. But the defendant may also file a cross-complaint for affirmative equitable

(3) 16 & 17 Vict. Ch. 125, sec. 83 (1853).
(4) Urner v. Sollenberger, 89 Md. 316, 337.
(5) See, for example, Wisconsin Statutes, 1898, ch. 118, sec. 2600.

relief against the plaintiff. A plaintiff may unite legal and equitable causes of action in the same suit. No one ever fails in a suit because he has chosen the wrong court, for there are no two courts under the codes. Law and equity are administered by the same tribunal (6).

§ 149. **Same: Affects procedure only, not rights.** This union of law and equity does not create any new substantive rights (7). Rights are still legal or equitable, as the case may be, with any limitations peculiar to the kind of right still applying to them. Further, this union does not increase or change the remedies which one may have for the violation of rights (8). It only enables the suitor to obtain those remedies in the same tribunal, and by the same methods of procedure. Trial by jury is safeguarded by the constitutions of the states. The United States Constitution grants this privilege to litigants in the Federal courts. However, the privilege of trial by jury is one which applies only at law and so only in legal actions. This privilege, of course, must be maintained under the codes. Therefore, whenever, in a suit under the codes, the issues to be tried are such as would have made the action one at law under the old system, trial by jury must be granted, if desired by either party (9).

§ 150. **Abolition of forms of action.** A little reflection on the distinctions between the forms of action, which were explained in the discussion of common law pleading

(6) Dobson v. Pearce, 12 N. Y. 156.
(7) Voorhis v. Child, 17 N. Y. 354.
(8) Eaton v. Smith, 19 Wis. 537.
(9) Meyers v. Field, 37 Mo. 434.

(Chapter II, above), will make one appreciate how highly technical were the rules governing the choice of actions. The difference between direct and indirect injury, for example, which was one of the points of difference between trespass and case (§ 38, above), was not always easy to draw. Further, a mistake in choosing the form of action was a serious matter. The defendant, for such an error on the part of the plaintiff, might demur, move in arrest of judgment, or even make it the ground of a writ of error. Thus he could take the objection for the first time in the final court of appeal (10). This often worked hardship, and seemed to be totally unnecessary to accomplish justice. In equity it is true, there were no forms of action. The drafters of the codes took the hint from equity, and abolished all the legal forms of action. This, coupled with the union of law and equity, resulted in the rule usually stated in express words in the codes, that all causes of action shall be proceeded upon in the same form; that is, by the same forms of proceedings (11).

§ 151. **Doctrine of theory of a pleading.** Many of the courts in code states have lessened the value of this reform by adopting a rule which existed under common law and equity pleading. That rule is that the plaintiff must set forth his cause of action according to some one theory, and that, having done so, he must recover according to that theory, even though on the facts which he has stated he has a good cause of action on some other theory (12).

(10) Turner v. Hawkins, 1 B. & P. 472.
(11) Scott v. Crawford, 12 Indiana, 410.
(12) Ross v. Mather, 51 N. Y. 108.

Suppose the plaintiff alleges that he is the owner and in possession of a Jersey cow named Belle; that the defendant entered the plaintiff's land and chased the said cow, seriously injuring her; that the defendant, by these acts, converted the said cow to his own use, to the damage of the plaintiff of $45, the value of the said cow. Plainly, on these allegations, the plaintiff is attempting to recover for a conversion. It is equally plain that the defendant's acts do not amount to a conversion. A conclusive reason for this is that the defendant never took possession of the cow. Therefore, the plaintiff cannot recover according to the theory on which he has brought the suit. It is also clear, however, that the defendant is liable for such damage as his intentional wrong actually did to the cow, and the facts to support this are all properly stated by the plaintiff. According to the rule that one must recover on the theory of his pleading, the plaintiff cannot in this suit obtain compensation for the injury done him. This seems an unnecessary strictness, unless the defendant was really misled and put into a disadvantageous position by the plaintiff's error. Then he should have an opportunity to put his proceedings into the proper condition for defending against the plaintiff's real cause of action. But, unless the defendant has been really misled and injured, there seems to be no reason for requiring the plaintiff to stick to the theory on which he starts his suit.

§ 152. **Joinder of causes of action.** We have had occasion to notice the rule governing the joining of causes of action at common law (§ 86, above). It will be remembered that the general principle was that different forms

of action could not be joined. In equity the limit was an entirely different one. It required that all the causes of action which might be joined should relate to or grow out of the same transactions or business dealings. The codes, of course, could not make the right to join causes of action depend on the form of action, because all the forms of action were abolished. The codifiers, therefore, attempted to classify causes of action in accordance with real distinctions between them, and to provide that causes of action of the same class could be joined. They also adopted the liberal equity rule that causes of action growing out of or related to the same general transaction could be joined (13).

Judge Phillips in his work on Code Pleading states (14) the commonest code provision as follows: "Several causes of action may be joined in the same complaint when the several rights of action all arise out of (1) the same transaction, or transactions connected with the same subject of action; or (2) contract, expressed or implied; or (3) injuries, with or without force, to person and property, or to either; or (4) injuries to character; or (5) claims to recover personal property, with or without damages for the withholding thereof; or (6) claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; or (7) claims against a trustee, by virtue of a contract, or by operation of law." The first one of these subdivisions is the adoption of the rule previously exist-

(13) Pfister v. Dascey, 65 Cal. 403.
(14) Sec. 195.

ing in courts of equity. The other subdivisions are the classes into which the codifiers attempted to divide all causes of action (15). If two causes of action fall in any one of the subdivisions they may be united.

§ 153. Changes in number of pleadings. At common law there was no limit, as we saw, upon the possible number of pleadings which the parties might use. After the replication, the rejoinder, the sur-rejoinder, the rebutter, and the sur-rebutter were exhausted, unnamed possible pleadings could be used. In equity, apparently, the pleadings were confined to three: the bill, the plea or answer, and the replication, but, in fact, the parties really could have the rebutter, the sur-rebutter, and all the other possible pleadings of the common law, by alternately amending the bill and the answer. If the defendant's original answer required a real replication on the part of the plaintiff, the plaintiff might amend his bill so as to include this replication. If this replication by the plaintiff thus put into the bill, required a real rejoinder by the defendant, he might amend his answer so as to include this rejoinder. The plaintiff may then again amend his bill so as to include a sur-rejoinder. This alternate amendment may in theory go on indefinitely. Of course, in practice, it would soon reach a limit. The codes did not adopt either of these plans. Like equity they refuse to have any pleading beyond a replication, but, unlike equity, they do not provide for incorporating into the first pleadings of the plaintiff and the defendant, respectively, the matters that would naturally come in re-

(15) Stadler v. Parmlee, 10 Iowa 23; Shore v. Smith, 15 Oh. St. 173.

joinders and further pleadings. Indeed, some of the codes stop the pleadings after the defendant's first pleading (16).

§ 154. Same: Effect of this change. Suppose the plaintiff sues the defendant for a trespass upon the plaintiff's land. The defendant sets up as a defense that the land is his freehold. The plaintiff replies that the defendant leased the land to the plaintiff for three years. The defendant wishes to rejoin that this lease was obtained by duress. Under the common law the defendant would simply use a rejoinder, setting up the duress. In equity, after the plaintiff had amended his bill so as to state the lease, the defendant would amend his answer so as to state the duress. But, under the codes, he cannot adopt either of these methods of proceeding. He is, therefore, unable to plead the duress in any way. Is he then to lose the advantage of this fact entirely? Of course not. The difficulty is overcome by permitting him to prove the duress at the trial, without having pleaded it at all (17). This violates the rule that one's proofs must be based on his pleadings, but it is the only way out of the difficulty which the codes have made. Of course, the reason why the number of pleadings is limited in the codes is to avoid the delay and expense and unnecessary refinements which the codifiers thought arose out of the rejoinder, rebutter, and the others. The English code pleading has not limited the number arbitrarily as is

(16) Dillon v. Ry. Co., 46 N. Y. Super. 21.
(17) Dambman v. Schulting, 4 Hun (N. Y. Supreme) 50.

done in our American codes. Possibly the English view is the better.

§ 155. **New names of pleadings.** The codes also adopted new names for the pleadings. The plaintiff's first pleading, instead of being called a declaration or a bill, is usually called a complaint. In a number of the code states, however, it is called a petition. The defendant's first pleading is called an answer. When a second pleading by the plaintiff is permitted. it is called a reply (19).

§ 156. **Abolition of formal allegations.** All the allegations under code pleading are to be the statements of material facts. Allegations required at common law, merely as a matter of form, such as unessential statements of time and place, or technical conclusions of pleadings, are made unnecessary (20). Time and place may, of course, have to be stated, but, if so, it is because they are really material, either in themselves, or as needful to properly describe or identify some material fact (21).

SECTION 2. CHANGES IN DEFENDANT'S PLEADINGS.

§ 157. **Demurrers and motions.** Under the codes, either party may demur to any one of the other party's pleadings. This follows the common law rule. But the use of the demurrer is considerably changed. By the latest common law almost all the defects in form were objected to by special demurrer. Under the codes this use of the special demurrer is abolished, and defects in form

(19) Kansas General Statutes, 1905, sec. 4968.
(20) People v. Ryder, 12 N. Y. 433.
(21) Balch v. Wilson, 25 Minn. 299, 302

have to be shown by motions (22). Under the common law, dilatory defects were open upon general demurrer, but under the codes these defects require a special demurrer (23). The use of the general demurrer is thus confined to objecting to a pleading because it is bad in substance. Further, a special demurrer for some dilatory defect does not include a general demurrer, as the common law special demurrer did (24). Under the codes every ground of demurrer is separate and distinct from every other ground, but one may, in one demurrer, set up two or more grounds.

§ 158. **Motions for judgment.** Another change is that under the codes either party may generally move for judgment for himself, on the ground that the opposite party's pleadings are defective in some respect which is still uncured (25). Defects in pleadings are cured under the codes in the same general way as at common law. This motion for judgment on the pleadings, which either party may make, is not subject to the technical limitations which apply to the motion in arrest of judgment and the motion for judgment non obstante veredicto which were in use at common law (§§ 97-102, above). These motions for judgment based on defective pleading are also supplemented by a motion which the defendant may make at the trial of the case. This motion is, in form, either to dismiss the case or to exclude all the evidence of the plaintiff. Whichever form it takes it is based

(22) Mooney v. Kennett, 19 Mo. 551.
(23) Berney v. Drexel, 33 Hun (N. Y. Supreme) 419.
(24) Evans v. Schaefer, 119 Ind. 49.
(25) Madden v. County, 65 Fed. 188.

on the fact that the plaintiff's complaint is defective, and it results in a dismissal of this case, but without barring the plaintiff from beginning a new suit based on a good complaint (26).

§ 159. **Denials and affirmative answers.** Affirmative answers are, of course, analogous to pleas in confession and avoidance at common law. Under the codes, no really affirmative defense can be proven, unless it is set up in an affirmative answer. The defendant is usually permitted to file a general denial, but this general denial simply puts in issue the necessary allegations of the complaint. Any fact which admits the truth of those allegations and amounts to a defense thereto must be set forth in an affirmative answer (27). The defendant is not compelled to use a general denial. He may file a special denial of any one fact in the complaint (28). He may use two or more of these special denials, and he may also use a general denial of all the allegations, except certain ones which he specifically admits to be true (29). The great reform which the codes have brought about in this connection is the abolition of the general issues, with their technical and often over-broad scope.

§ 160. **Dilatory answers.** We saw, in connection with common law pleading, that when a dilatory defect does not appear upon the face of the declaration, the defendant must set it up by a dilatory plea (§ 113, above). Likewise, in code pleading, if a dilatory defect does not appear

(26) Tooker v. Arnoux, 76 N. Y. 397.
(27) Mauldin v. Ball, 5 Mont. 96.
(28) Roberts v. Johannas, 41 Wis. 616.
(29) Mattoon v. R. R. Co., 6 S. Dak. 301.

upon the face of the complaint, the defendant must set it up by a dilatory answer (30). It is sometimes said that dilatory pleas were abolished by the codes, but this is only true in form and is substantially untrue. Dilatory defects not appearing in the complaint may still be taken advantage of by the defendant. The codes simply do not put dilatory pleas into a class by themselves as they were at common law. When dilatory defects are set up in an answer, the rules that we saw applied to dilatory pleas at law apply to this dilatory answer. The defendant, for example, must still in his dilatory answer show the plaintiff how to bring a suit which will avoid the defect, and the dilatory answer must be very complete in its allegations, showing the existence of the defect (31). At common law, dilatory pleas had to be filed and passed upon before the filing of pleas in bar. Some of the code states still have this rule (32). Others, however, permit the defendant to join in one answer all the defenses he may have, no matter whether they are dilatory or to the merits (33).

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(30) Hornfager v. Hornfager, 6 Howard Pr. (N. Y.) 279.
(31) Pyron v. Ruohs, 120 Ga. 1060.
(32) Kenyon v. Williams, 19 Ind. 44.
(33) Sweet v. Tuttle, 14 N. Y. 465.

PRACTICE

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INTRODUCTION.

§ 1. **Practice a branch of adjective law.** As has been said elsewhere in this work (1), law may be roughly subdivided into two parts, substantive and adjective law. Adjective law is the procedural part of the science. Practice is one of its branches, and embraces the rules under which a recalcitrant party is brought before a court and compelled to perform his duty, or by which controversies over the existence of rights or duties are presented to courts for determination. Thus, the law may make it the duty of one man to pay another a sum of money, to give to him the possession of a piece of property, or to recognize in him some other right. The party who owes

(1) Introduction, § 13, in Volume I.

this duty may refuse to perform it, or he may differ with his adversary as to the existence of any duty. Courts are established to compel men to perform their legal obligations, and to determine whether such obligations exist under the facts presented. In order to present the situation to the court from which the legal obligation is claimed to arise, and to procure an enforcement of the right, if the law gives one, certain steps must be taken in court, preliminary to the actual trial of the case before a judge or jury; certain things should be done at the trial, to preserve for review in an upper court the rulings of the trial judge; and some matters require attention, even after the trial of the case, in order to secure the fruits of victory or to procure a review in an upper court.

It is the function of the law of Practice to prescribe rules for getting a controversy properly before a court for trial, for taking steps at and after the trial to procure a review of any errors committed during the trial, and for realizing on any judgment the court may enter. A review of the essential rules of Practice, beginning with the commencement of a suit and ending with its decision in a reviewing court, will here be given.

CHAPTER I.

VENUE AND JURISDICTION.

Section 1. Venue.

§ 2. In state courts. By venue is commonly understood the county or district in which a suit may be brought. For purposes of discussion of this subject, all actions that may be brought may be conveniently divided into transitory and local actions.

In general, all actions based upon a contract for the recovery of money and all actions for the recovery of money damages for injury to the person of another or to his personal property are *transitory* actions. Such actions may be brought, as a rule, in any county in which the defendant may be found so that process may be served upon him. As the name indicates, the place to bring the suit is not limited to any particular county but travels with the person of the party against whom the action lies.

Local actions are those that may be brought for the recovery of possession of, or for injury to real estate. Thus, actions of ejectment and actions for trespassing upon land are local actions. Such actions have their venue only in the county where the land is situated. Thus, if a railroad company has wrongfully taken possession

of or trespassed upon another's land, he can bring suit against it only in the county where the land is located, although it might be more convenient to bring suit in some other county. In a case where the plaintiff's company claimed to have sustained an injury to a mine located in South Africa it brought suit to recover the damages in England. The court refused to hear the case, because the only court in which an action for such injury could be brought was in South Africa where the land was situated (1). See Conflict of Laws, § 108, in Volume IX of this work.

§ 3. **In Federal courts.** The Constitution of the United States makes actions between citizens of different states cognizable in the Federal courts. In that important class of actions, Congress has provided that such suits may be brought in the Federal district of which either the plaintiff or defendant is an inhabitant. Thus, if the plaintiff, who has a claim on a note against the defendant, is an inhabitant of the district of Indiana and the defendant of a district in New York, the plaintiff may bring suit in the district of which defendant is an inhabitant. If, however, the defendant can be found in the district of Indiana and process is served upon him there, the suit may properly proceed in Indiana.

§ 4. **Defects as to venue may be waived.** The requirements of practice, demanding that a defendant be sued only in a certain county or district, may be easily dispensed with, if the defendant desires. The law accords

(1) British South African Co. v. Companhia De Mocambique, [1893] A. C. 602.

him the privilege of being sued, in some instances, in a certain county or district only, for his benefit and protection. If he choose, he may waive this privilege. In Central Trust Co. v. McGeorge (2) the Central Trust Company of New York brought a suit in the United States circuit court for the western district of Virginia against the Steel and Iron Company, a New Jersey corporation. The defendant company entered its appearance in the case. The lower court, while admitting that the parties were citizens of different states, yet held that, as neither of them was an inhabitant of the western district of Virginia in which the suit was brought, it had no jurisdiction and dismissed the suit. The Supreme Court reversed the case, and on the matter of waiver said: "Undoubtedly if the defendant company, which was sued in another district than that in which it had its domicile, had, by a proper plea or motion, sought to avail itself of the statutory exemption, the action of the court would have been right. But the defendant company did not choose to plead that provision of the statute, but entered a general appearance, and joined with the complainant in its prayer for the appointment of a receiver, and thus was brought within the ruling of this court, so frequently made, that the exemption from being sued out of the district of its domicil is a personal privilege which may be waived, and which is waived by pleading to the merits."

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(2) 151 United States, 129.

SECTION 2. WHEN A SUIT IS DEEMED BEGUN.

§ 5. **In courts of law.** It frequently becomes material to ascertain when a suit was commenced, with respect to the statute of limitations. If the action for the recovery of a demand, on which the statute is claimed to have run, is commenced before the statutory period has fully run, the defense of a bar by the statute is ineffective. It thus is important to know when a suit is deemed commenced for the purpose of preventing the bar of the statute defeating a cause of action. Courts differ in their rules as to just when a suit at law is commenced. Some courts take the view that the action is commenced, when the plaintiff has asked the assistance of the court and has procured the issuance of a summons which is placed in the hands of his attorney. Others take an extreme view the other way, and hold that the summons must be placed in the hands of the sheriff and returned by him to show an action was commenced when the writ was issued. An intermediate view holds that the issuance of a summons and placing it in the sheriff's hands constitutes the commencement of a suit.

§ 6. **In courts of equity.** The rule in equity cases, as to when a suit is commenced, is also not uniform. The doubt that exists concerning it and what seems the modern rule, is well expressed in Fairbanks v. Farwell (3) where the court said: "It may well be doubted whether the mere filing of a bill in chancery, of itself, without the issuing or service of process, is sufficient to arrest the

(3) 141 Illinois, 354.

running of the statute. The modern rule seems to be, that the filing of a bill and taking out of a subpoena and making a bona fide attempt to serve it, is the commencement of a suit in equity, as against the defendant, so as to prevent the operation of the statute." (The statute referred to is the statute of limitations.)

SECTION 3. JURISDICTION OF SUBJECT MATTER.

§ 7. In general: Jurisdiction of subject matter. As stated above, it is in the courts that rights and duties between men are established and enforced, when any dispute arises as to the existence of a duty or when the party who owes the duty is derelict in its performance (4). The courts are a part of the governmental machinery established by the people to administer justice between them. The law creates them, and it is from the law that their powers are derived. These powers may be defined in the constitution or in the statutes, more commonly in the latter. For convenience and general efficiency some courts are given one class of litigation and others another. This classification is usually made by statute. Thus, one court may be devoted entirely to the administration of the estates of deceased persons; ordinarily such a court is known as a probate or surrogate's court. Another court may be created to try criminal cases and none other. A third court may be established to have exclusive power to hear and determine all disputed matters involving the principles of equity, and so on. Any discussion of the question, which court has the authority to determine a particular controversy or

(4) § 1, above.

to hear a certain case, involves a problem of the court's jurisdiction of the subject matter. It is because courts are limited in their powers and because their capacities to adjudicate matters in controversy are specifically defined, that such questions are of importance in the law of Practice.

§ 8. **Same: Jurisdiction of parties.** Entirely distinct from the power of the court, under the law of its organization, to hear a certain controversy is the question, whether the parties to the controversy have come or been brought before the court. It is fundamental that the power of a court to pass upon a plaintiff's rights depends upon whether he has himself submitted the matter upon which the court has power to pass. The court cannot arbitrarily pass upon his case without his request to have it do so. On the other hand, if a party invokes the aid of a court, it can only proceed to a proper adjudication in the event that it gets jurisdiction of the person of the defendant to the controversy. He may come into court voluntarily. If so, there is no further question as to jurisdiction over him. If he does not voluntarily submit, it is essential to the determination of his rights that he be brought into court. A discussion of the jurisdiction of the subject matter and of the parties follows.

§ 9. **Jurisdiction of subject matter.** As stated at the outset, in order to have an effective determination of a controversy, it must be submitted to a court that has power to hear and determine it. If it does not belong to the class of cases the court has power to hear, such power cannot be assumed by the court itself, nor created

by the voluntary action of the parties to the suit in consenting to permit the court to determine the controversy. The people have placed limits upon the court's power, and neither it nor the litigants can change them. If a court usurps the function of another court its decision is null and void. Its power, if exercised at all, must be exercised within the field over which it was given jurisdiction by the law. Whenever it goes beyond that, its determination is a nullity.

§ 10. **Same: Illustration.** Thus, in a certain case (5) a probate court had power over the administration of estates of infant wards by guardians. The guardian had given a bond, which would be violated if he did not properly account for all the money or property the probate court found he was obliged to account for. The probate court, in settling the accounts, specified that the guardian was liable for certain money belonging to the ward which he received during the ward's minority. It also found that he was accountable to the ward for certain money he had received since the ward's majority. The guardian was unable to pay either of the sums, and an action was brought on his bond. The bondsman claimed that the determination of the probate court that the guardian owed the ward for money received on his behalf after his majority was null and void. The basis of his contention rested on the point that the probate court had no power to pass upon matters not involving the rights and duties of guardian and ward, and that the matter of the guardian's duty to account for money received

(5) People v. Seelye, 146 Illinois, 189.

from the ward's property, after his majority, could only be passed upon in some other court, it not involving the relations of guardian and ward. The court so held, and decided that the bondsman was liable only on such part of the probate court's settlement as it had the power to make.

§ 11. **Consent of parties cannot give jurisdiction of subject matter.** However convenient it may be to have a court, near the place where the parties reside and to which they have by agreement brought their controversy, pass upon it, such considerations can have no effect on the court's jurisdiction of the subject matter. Thus, in Dudley v. Mayhew (6) a bill was filed in a state court to restrain the infringement of a patent. Federal courts are the only courts that have power to pass upon controversies arising out of patent rights. The defendant at first pleaded that the state court had no jurisdiction of patent cases. Later he agreed, for a valuable consideration, not to raise the point. When a decree was rendered against him, however, he appealed the case and raised the question of jurisdiction. The court held that the United States Constitution and the Federal statutes had conferred exclusive jurisdiction in patent cases upon the Federal courts, that state courts have no jurisdiction in patent cases, that jurisdiction could not be conferred by the consent of the parties, and that the consent of the defendant, although in the nature of a contract for a valuable consideration, could not confer jurisdiction upon the court to render a valid decree.

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(6) 3 New York, 9.

§ 12. Jurisdiction of subject matter may be contested at any time in any court. The question of the proper jurisdiction of the subject matter is of the utmost importance in litigation. An error in that regard is far reaching, as it nullifies all the proceedings taken by the court. Unlike many other questions, it may be raised at any time by the defendant while the case is pending in the trial court. The court may of its own motion dismiss a case at any time for lack of power to pass upon it. But the parties are not limited to the lower court's action upon a motion to dismiss a case for want of jurisdiction. It may be that the lower court made no ruling upon the question at all. This does not prevent the defendant from raising it for the first time in a reviewing court. The question of jurisdiction, unlike other questions of practice, can be raised in an upper court without having been raised in the trial court. Thus, in the case of Aurora v. Schoeberlein (7), the court, after stating that the question of the jurisdiction of the subject matter need not be raised in the lower court, in order to take advantage of the point on appeal, held that the trial court had no jurisdiction of the case. It is a matter of practice that cannot be waived, either by express action or consent of parties, or by failure to act or to request a lower court to act upon it.

Section 4. Jurisdiction of the Parties.

§ 13. Jurisdiction of plaintiff. As a usual thing there can be little difficulty with reference to the jurisdiction of the court over the person of the plaintiff. He comes

(7) 230 Illinois, 496.

voluntarily into court and asks its assistance in his behalf. When he has done this the court has jurisdiction of his person, and no further question can arise with reference to it. Cases have arisen, however, where the jurisdiction of the court over the person of the plaintiff was not procured, and where the judgment of the lower court was refused merely because such jurisdiction had not been procured. Thus, in Bell v. Farwell (8) suit was brought by attorneys in the name of Bell against Farwell. After the case had been in court for several years, Farwell discovered that Bell had not authorized the bringing of the suit and that he was entirely ignorant of its having been done. This fact was properly shown to the court with a request to dismiss the suit. The request was resisted on the ground that Bell was only a nominal plaintiff, and that he had assigned the claim to another in whose behalf the suit was being prosecuted in Bell's name. No showing was made, however, that the assignee of the claim had authorized the suit to be brought. The court held that as Bell had not authorized the bringing of the suit, nor the assignee who was entitled in law to use Bell's name, it must be dismissed.

§ 14. **Jurisdiction of defendant.** After the venue of a case has been properly ascertained, and the suit commenced in the proper court by the appearance of the plaintiff upon a request for the assistance of the court, it is then in a position to proceed further with its duties as a tribunal of justice. The next proper step to be taken is to procure jurisdiction over the person of the defend-

(8) 189 Illinois, 414.

ant. This is essential, as proper notice to him in some form of service must be given before a binding judgment can be entered against him. In Greenman v. Harvey (9) a widow brought a suit to have dower in certain lands, in which a minor defendant had an interest, assigned to her. The widow's dower was assigned, after the minor's guardian had appeared in court on her behalf without service of process being had upon her. The supreme court reversed the decree of the lower court assigning dower, saying: "As owner of one-half the fee at law, she (the minor) was a necessary party, that, on final hearing, her interests and rights should be passed upon and determined. Not having been brought before the court, she is not bound by the decree, and may, in the future, contest the right of the widow to dower as though this proceeding had never been instituted. . . . Nor does the minor become a ward of the court until she is served either by summons or by publication. The court assumed no jurisdiction over the minor in this case." It is thus seen that only after service of process is had upon a defendant, who can become a party to a suit only by such service, can a court, that has jurisdiction of the subject matter, proceed to give a binding judgment.

§ 15. **Same: Acquired by service of process.** A defendant is unwilling, as a rule, to be made a party to litigation of any kind. To make him a party against his will he must be notified. The notice is given him in most cases by serving him with process. This is usually the initial step to be taken by the plaintiff, directly against

(9) 53 Illinois, 386

the defendant, in the course of the determination of the rights and duties between him and the defendant. It is the first point at which the defendant may strike to defeat the particular suit. Defendants have taken occasion to test the service of process upon them in many suits, and well defined rules of practice have grown up with reference to the proper service of process. We shall examine somewhat at length these rules of practice whereby the court obtains jurisdiction of the person of the defendant. In the course of the discussion of the various phases of the service of process, it should be carefully borne in mind that the entire subject is directly related to the subject of the jurisdiction of the courts, a fundamental matter in all litigation and absolutely essential to procure a valid judgment.

CHAPTER II.

SERVICE OF PROCESS.

§ 16. In general. From what has been stated, it may be seen that the defendant is bound by what a court does, in a case to which he is a party, only in the event that he has been notified of the proceeding. The form and requisites of such notice are material. The method of serving the notice varies with varying circumstances, chiefly depending upon whether the defendant is a resident of the state or a non-resident. There are also various methods by which to test the sufficiency of the service of process. These matters will be treated in this order.

Section 1. Formal Requisites of Summons and Officer's Return.

§ 17. Form and requisites of summons. The summons is the formal notice to the defendant to appear and defend the action. It should contain a statement of the venue—the county in which the suit has been brought. As there are usually different courts in the same county, it should state the court in which the suit is pending, and also the place at which the court is sitting for the time being. Where process can be served only by an officer of the county, such as sheriff or coroner, it should be addressed to such officer. In some jurisdictions the plaint-

iff or his attorney may give a notice to the defendant and bring him into court in that way. Where such a practice prevails, no direction to an officer is necessary. The summons should also contain the names of the parties to the suit, the nature of the cause, and the amount sued for, if a money demand is involved. It is intended by the summons to give notice of when the defendant is required to appear and defend. This is usually the return day and the summons should state it. The clerk of the court issues the summons and it should be signed by him. Furthermore, it should contain the seal of the court.

§ 18. **When process should run in name of the people.** In some states it is essential that a summons should run in the name of the people of the state. Thus, in Knott v. Pepperdine (1) this requirement is shown to exist in the state constitution of Illinois. The court there said: "It is insisted that the summons in this case is void, because it does not run 'In the name of the People of the State of Illinois' as required by . . . the constitution. The writ runs, 'The People of the State of Illinois to the Sheriff of Kankakee County'. There is no foundation for the objection. The writ does run in conformity with the constitutional requirement." This requirement, that the summons run in the name of the people, is unnecessary in those states where service may be made by a mere notice. Thus, in Wisconsin, a summons is a mere notice and not process, and it is not necessary that it should run in the name of the people (2).

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(1) 63 Illinois, 219.

(2) Porter v. Vandercook, 11 Wisconsin, 70.

§ 19. **Return day of summons.** As stated, the summons should state on its face when and where it is returnable. It is thus the party learns when and where it is his duty to be present to answer to the plaintiff's case. When it is to be made returnable by the clerk of the court depends upon the statutory requirements in the different states. It may be made returnable at the next term, or within a certain number of days after the issuance. If made returnable at a proper time, it is the duty of the defendant to appear or he may be defaulted for failure to do so. If, however, the return day is fixed at a time that violates the requirements of law, the defendant need not appear, as the summons is void and service of a void summons is ineffective to give notice.

§ 20. **Officer's return of service.** The summons, where notice is given by summons, is served by the officer to whom it is addressed. The manner in which he must serve it is prescribed by law and differs in different cases, depending upon the nature of the cause, upon whether the defendant is a natural or artificial person, and upon other circumstances. It is the officer's duty to follow the method prescribed and to make a correct statement thereof on the back of the summons. This is known as the officer's *return*. On or before the day upon which he is called upon in the face of the summons to return it into court, it is his duty to file it there. From the return on the summons may be ascertained the sufficiency of the service. The word "return" is appropriately applied also to the delivery of the summons to the court. Until so delivered there is no return, although an en-

dorsement of the manner of service may be made on the summons. This endorsement may be changed at any time before it is delivered to the court, but thereafter it can only be changed with the court's permission.

Section 2. Service Upon Residents and Persons Found in Court's Jurisdiction.

§ 21. **Classification of defendants respecting service of process.** The courts have recognized two distinct classes of defendants in the development of the rules of practice for the service of process. On the one hand, are the defendants who are domiciled in the state and an integral part of the commonwealth, persons who will be known throughout this discussion as "residents." With these will be placed persons who are not domiciled in the state, but who have come temporarily into it and are there actually served with process. On the other hand, are the defendants who are domiciled beyond the state and who, to contrast them conveniently with the former class, will be called "non-residents." The possibility of a court getting jurisdiction of persons in the second class is much more limited than of persons in the first class. The classification is a valuable one and this section and the next will be devoted to a treatment of the rules of practice applicable to each, and to a discussion of the effect of the nature of the relief sought upon the possibility of a court acquiring jurisdiction of a non-resident at all.

§ 22. **Forms of service upon residents.** As a general statement service of process may be made on residents in one of two ways: (1) By actually finding the defendant and serving him personally. This form of service

is known as *personal* or *actual* service. (2) By doing whatever is provided by the law other than making actual service on the defendant, such as leaving a copy of the summons with some member of the defendant's family, and the like. This class of service takes on various forms, and is known as *substituted* or *constructive* service. As stated by the court (3) in an important case: "The law provides for two methods of service of process: the one actual and the other constructive. Actual service of process is made by reading the original process to the defendant or by delivering to him a copy thereof; and constructive service of process, which is a substituted service of process, is made by leaving a copy of the process at the defendant's residence when he is absent, or by posting or publishing notice of the pendency of the suit and mailing a copy of the notice posted or published to the defendant, if his post-office address is known."

§ 23. **Actual service of summons at common law.** In the absence of a statute prescribing the method of serving a defendant with summons, the common law method must be resorted to. In the early history of the law, publication in a newspaper was impossible. Mere delivery of a copy of the summons, or posting it upon the door of the defendant's dwelling, would have been an inefficient and unsatisfactory method, as few persons could read. The only natural and efficient method, that of reading it to the defendant was therefore adopted. As stated by the court in Botsford v. O'Connor (4): "The mode of ser-

(3) Nelson v. Chicago, B. & Q. R. R. Co., 225 Illinois, 197.
(4) 57 Illinois, 72.

vice of summons, when not otherwise provided by statute, is by reading the same to the defendants, and the return should show the time when, upon whom, and the manner in which, service was made; and, unless it thus appeared, the court failed to acquire jurisdiction. . . . It must affirmatively appear, from the officer's return, that there was a legal service, and that it was such service as gave the court jurisdiction over the person of the defendant." It need scarcely be mentioned that reading to any one but the defendant would not have been sufficient. Reading to him personally was essential to a valid service.

§ 24. **Form of actual service under modern practice.** The common law requirement, that a summons be read, is rarely adhered to under modern practice. The science of the law undergoes constant change and adjustment to comply with corresponding changes in society. The common law requirement of reading was in all likelihood indispensable in the great number of cases, as the ability to read was not common. With the growth of public education came a change in the ability of the masses to read, and consequent change has been made in the method of actual service. Instead of the former requirement, it is common to find statutes providing for service by the delivery of a copy of the summons, sometimes by the officer stating briefly the contents, and at other times a mere delivery is sufficient. These forms of actual service, being regulated by statute, no general practice is universally followed.

§ 25. **Service of summons on non-resident while in jurisdiction is valid.** Personal service upon a resident of

the state or county where the court is sitting is common and effective to confer jurisdiction. It has also been held that service on a resident of another state than that in which he is served is valid to give the court jurisdiction. In Darrah v. Watson (5) the defendant, a resident of Pennsylvania, went to Virginia on business a few days. While there he was served with a summons, but failed to appear to defend, was defaulted, and a judgment was rendered against him. He was later sued on this judgment in an Iowa court, and he sought to defeat it on the ground that he had been served while temporarily in Virginia. The Iowa court held the defense insufficient and gave judgment on the Virginia judgment. The case shows that service upon a resident of a state or county, other than the one in which the court is sitting, while such person is within the court's territorial jurisdiction, is valid, and a judgment rendered on such service where the defendant makes no defense is binding upon him.

§ 26. **Service of summons beyond limits of jurisdiction is ineffective.** If a non-resident comes into the territorial jurisdiction of the court he may be served there, and it is his duty to appear and defend the suit. While a non-resident may be made a party to a suit where he is served in the court's jurisdiction, he cannot be served beyond the court's jurisdiction. In Isett v. Stuart (6) a suit was instituted by Stuart as assignee in bankruptcy of Thomas M. Isett to set aside an alleged fraudulent conveyance claimed to have been executed by Isett to his brother.

(5) 36 Iowa, 116.
(6) 80 Illinois, 404.

The two brothers, who were both parties to the suit, defended against the assignee's claim on the ground that the court that appointed him assignee had not obtained jurisdiction over Thomas M. Isett, because it sat in New York and he had been personally served in New Jersey beyond the New York court's jurisdiction. The court held the defense good, that the service was invalid, and that, as a result, Stuart had no power whatever as assignee of Thomas M. Isett, to which position he was appointed by a court which had not obtained jurisdiction of Isett, and could not maintain the action to set aside the alleged fraudulent conveyance.

§ 27. **Same (continued).** In the case of Bank of China v. Morse (7) the court, in discussing the invalidity of a judgment entered in England upon service not made there, said: "The English courts had no jurisdiction to render a personal judgment binding upon the defendant. The rule is elementary that no sovereignty can extend the process of its courts beyond its territorial limits, or subject either the person or property of the party to its judicial decisions or judgments, where neither he nor his property is within its boundaries. Any attempted exercise of such authority would be beyond the power of the sovereignty to grant, and, as all judicial power must flow from the state or commonwealth, its grant of power is necessarily defined by its boundaries, and no service outside would confer any jurisdiction of the defendant which would enable it to award a personal judgment against him, and no judgment or order thus obtained has

(7) 168 New York, 458.

any force or effect in this state, either to bind the defendant personally or his property therein."

§ 28. **Substituted or constructive service on residents.** Ordinarily, as to residents of the state, any form of service reasonably adapted to give the defendant notice is sufficient. A common form of substituted service is that of leaving a copy with some member of the family, in case the defendant cannot be found. Thus in Settlemeier v. Sullivan (8), an Oregon statute authorized service upon a defendant, in case he could not be found, by leaving a copy of the complaint and a notice at his usual place of abode with a member of the family. A judgment was taken against the defendant in the state court, on a return of service which stated that a copy of the complaint and notice had been left with his wife, but it failed to state that he could not be found. The Federal court in this case refused to recognize the judgment as of any force whatever. The case is an instructive one, as it shows a common form of substituted service, and furthermore illustrates the necessity of following the method of service prescribed by a statute strictly.

§ 29. **Same: Copy left with person adversely interested in suit.** In certain cases, where substituted service is made by leaving a copy with a member of the family, who, from his interest in the controversy, would not be presumed to give the copy to the defendant, courts have held the service invalid. This limitation upon the general power to use a substituted service is well illus-

(8) 97 United States, 444.

trated by the case of Manternach v. Studt (9). In that case Mrs. Manternach had claims against her husband's estate, and, to pay them, a proceeding was instituted under the statute by the administrator of the husband's estate to sell certain of his lands, the title to which had descended to his children. Nominally Mrs. Manternach was not the moving party, but the proceeding was instituted for her benefit against the minor defendants, the heirs, whose mother and guardian she was. The service in the proceeding was made upon the minors, by delivering a copy of the summons to their mother. This was the only service shown by the return. The court held, that, because the mother's interest lay in keeping a knowledge of the filing of the petition from the very children for whom she received the copy of the summons, the service was void.

§ 30. **Substituted service upon corporations.** The usual method of procuring actual service upon a corporation is by serving its principal officer, the president. If, however, he cannot be found, then it is common for service to be permitted by leaving a copy with some inferior officer or agent. The practice in serving a corporation is somewhat analogous to that of serving an individual. The manner of service is, of course, adapted to the peculiar organization of the artificial body. For the member of the family with whom a copy may be left, where the defendant is a natural person, is substituted some member of the group of inferior officers or of the group of the corporation's mere agents. If the defendant's president, who em-

(9) 230 Illinois, 356.

bodies the corporation for the purposes of service of process, cannot be found, then a substituted service is possible. Statutes fix the persons who may receive the service if the president cannot be served.

§ 31. **Same: Copy left with person adversely interested in suit.** The same limitation which was seen (10) to exist, where substituted service is made on a natural person, exists in certain cases of substituted service on artificial persons. If an agent of a corporation brings suit against it and then receives the copy of the summons served upon it by the officer, such service is of no force. Thus, in St. Louis & Sandoval Co. v. Edwards (11) a director of the Sandoval Company brought a proceeding against it to wind up its affairs. The summons was served upon the company by the officer leaving a copy of it, as provided by a statute, with the director who was the plaintiff in the suit. No one appeared to defend for the company and a decree was entered against it. On a writ of error the reviewing court held that the decree was void, because service on a corporation cannot be made by leaving a copy with one of its directors, if that director is the plaintiff in the suit. In a case where an officer or agent sues the corporation of which he is such officer or agent, service must be made by delivering a copy to some other officer or agent, in order to be effective. A limitation is thus, by interpretation, placed upon the plain language of statutes, to avoid what might in many cases result in injustice against the corporation.

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(10) See § 29, above.
(11) 103 Illinois, 472.

§ 32. **Substituted service on residents by publication and mailing notice.** In the preceding subsections it has been seen that substituted service by delivering a copy of the summons may be had upon both natural and artificial persons, who are residents of the state. Another method of substituted or constructive service is that of publishing a notice in a newspaper and sending a copy thereof to the defendant. In the leading case of Nelson v. Chicago, Burlington & Quincy Railroad Company (12) the railroad company injured Nelson. He brought suit to recover the damages caused by its negligence in injuring him, and sought a personal judgment against it. A statute of the state provided, that, if a railroad company had no officer or agent in the county but its road ran through it, service could be had upon it by publishing a notice of the suit in a newspaper and sending a copy thereof to the company. Service was made in accordance with this statute. It was contended that the statute was unconstitutional, as service by publication could not be the foundation for a mere personal judgment. The court refused to admit the correctness of the contention and said: "Each state may determine for itself in what method process may be served upon its citizens within its own boundaries, and, while such legislation will have no force outside the state, service of process within the state in the manner pointed out in the statute regulating the method of obtaining such constructive service of process, if the method of service of process provided for is such as to amount to due process of law, as these terms are used in the state and Federal constitu-

(12) 225 Illinois, 197.

tions, will be sufficient to authorize the courts of the state, within whose jurisdiction the service of process is had, to pronounce a personal judgment or decree against a defendant so served with process; although cases may arise in practice, upon such constructive service of process, where a personal judgment or decree might be obtained against a defendant, without such defendant having received actual notice of the pendency of the action prior to judgment or decree. . . . A personal judgment in an action at law may be rendered against a defendant, residing in and who is in the state where the suit or proceeding is pending, who has been notified of the pendency of the suit by constructive service of process, where it appears actual service of process could not be had upon the defendant, if the constructive service provided for was required to be had in such manner that the reasonable probabilities were that the defendant would receive notice of the pending action or proceeding, before judgment or decree was rendered against him."

§ 33. **Substituted service by tacking notice on defendant's door.** The statutes of some states provide that substituted service may be had by tacking a copy of the summons on the door of the defendant's residence. By statute in New York (13), if it is shown that a defendant is avoiding service so that personal service cannot be had upon him, an order of court may be procured authorizing substituted service by leaving a copy of the summons with a member of his family, and, if no such person can be found, then by affixing a copy of the summons on the outer or

(13) Gilbert's Annotated Code of New York, §§ 435-6.

other door of the defendant's residence and giving him notice by mail. In King v. Davis (14) substituted service was attempted by posting a copy of the summons on the door of the defendant's residence. The return of the summons showed that the copy had been posted on the door of the defendant's residence, but did not state that it was the *front* door, as required by statute authorizing this form of substituted service. The court held the service insufficient. The case is valuable to show the practice in some of the states of permitting this form of service under certain circumstances, and also how strictly the statute must be followed.

Section 3. Service Upon Non-Residents: Essentials of Jurisdiction.

§ 34. In general. The problems presented for consideration in this section are entirely distinct from those already considered. The power of the courts of one state over a person in a foreign state is subject to limitations recognized both under the Constitution of the United States and under the rules of Conflict of Laws. We are here concerned with the power of a court to give an effective judgment against one over whom it has no personal control, and who owes no personal allegiance to the state. We shall consider the limits of judicial power to affect non-residents, the circumstances under which and how far it may do so; and shall group, so far as may be, the classes of proceedings in which it is possible for the courts of one state effectually to bind non-residents by their judgments.

(14) 137 Federal, 198, 208.

§ 35. **Essentials of jurisdiction to affect rights of non-resident not served with process in the state.** A court secures no jurisdiction of a non-resident served with process by an officer who passed beyond the state line. If, however, the non-resident has property within the state, and the aim of the plaintiff's proceeding is to affect his interest in that property, or to apply the particular property to the payment of a personal judgment which may be procured in the proceeding in which the property has been seized, a different situation arises. The non-resident in such a case has an indirect relation to the state; his property is subject to its control even though he is personally in another state. It is within the power of the state to affect him indirectly by proceeding against the property he has within its borders.

The fact that a non-resident has property in the state is one requisite for a binding judgment against him. It lies at the foundation of two of the classes of proceedings that can be taken against non-residents, namely, proceedings strictly *in rem* and proceedings *quasi in rem.* In a third class of proceedings, *divorce* proceedings, a "res" (thing, object) in the jurisdiction is also requisite, but it does not consist of property, as it does in the first two classes mentioned, but of a status or relation between two persons. Courts have considered this relation a sufficient res to permit them to affect the interests of a non-resident in that relation, at the suit of one domiciled within their jurisdiction.

§ 36. **Proceedings in rem.** Proceedings in which the moving party seeks, not a personal judgment against the

non-resident, but a judgment depriving him of or defining his interest in property within the court's jurisdiction, are proceedings in rem. The nature and theory of such proceedings will be found set forth in the article on Conflict of Laws, §§ 109-15, in Volume IX of this work. A few of the commoner proceedings of this character may be mentioned here.

Actions brought for the purpose of making a ship liable for an injury or a debt and then selling her to satisfy the claim are brought without making the owners parties, the theory of the procedure being to take the vessel after a liability has been established, not against the owners, but against it. This was perhaps the earliest well-recognized procedure by which the interest of an absent non-resident could be affected, and the curious form of the action, against the ship itself, was due to an historical fiction to avoid the difficulty of the owner's non-residence (15).

Actions to have land registered under the Torrens land registration system are instituted against adverse claimants for the purpose of having the interest of such claimants determined. See Title to Real Estate; §§ 124-28, in Volume V. There is no attempt to get a judgment for a money demand against them, but merely to have their interests fixed and placed on record, or to have a determination by the court that the interest is invalid and that it should be deemed non-existent (16). Of a very similar character is the proceeding brought to remove a cloud on

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(15) Tyler v. Judges, 175 Mass. 71. 76-77. See Conflict of Laws, § 110, Vol. IX.

(16) Tyler v. Judges, 175 Mass. 71.

title against land in the court's jurisdiction. A non-resident may have a claim shown on the land records which should not be there. This proceeding again is based on the theory that the moving party is entitled to a decree determining and ending the non-resident's apparent interest, and not upon the fact that he owes the moving party any debt for which he should have a judgment entered against him (17). Another instance is the condemnation by a railroad of land owned by non-residents. Here, again, the railroad has no personal claim upon which it sues; its sole object is to procure a judgment of the court that, upon its complying with certain conditions, such as payment of the amount fixed by appraisers who value the land sought to be taken, the title shall be transferred from the non-resident to the railroad (18).

§ 37. **Proceedings quasi in rem.** A proceeding quasi in rem has for its ultimate object the application of a non-resident's property to the satisfaction of some money judgment entered by the court in the course of the proceeding. It is in this that it has its distinguishing feature. The exact character of proceedings quasi in rem is stated thus by the United States Supreme Court in Freeman v. Alderson (19): "There is, however, a large class of cases which are not strictly actions in rem but are frequently spoken of as actions quasi in rem, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted.

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(17) Arndt v. Griggs, 134 U. S. 316. See Conflict of Laws, §§ 111-12, Vol. IX.

(18) Huling v. Kaw Valley Ry., 130 U. S. 559.

(19) 119 United States, 185, 187.

Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the state, and actions for the enforcement of mortgages and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ, among other things, from actions which are strictly in rem, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties."

§ 38. **Same: Seizure of property before judgment necessary.** A seizure of the property before the entry of the judgment is an essential prerequisite to its validity for the purpose of applying the property to its satisfaction. This was decided in the leading case of Pennoyer v. Neff (20). Neff, a non-resident of Oregon, owned land in that state. A suit was brought against him upon a demand for services as an attorney. Process was served upon Neff by publication, but the land was not seized before judgment. Neff did not appear. Judgment by default was rendered against him and his land sold to Pennoyer at an execution sale to satisfy the judgment. Neff then brought an action of ejectment against Pennoyer to get back his land, on the theory that the proceedings of the court that had sold it, upon a judgment rendered against him before the land was seized, were void and ineffectual to take his title from him. The case was taken to the United States Supreme Court, which held that his contention was cor-

(20) 95 United States, 714.

rect and restored possession of the property to him. The court recognized that a seizure of the property before judgment was essential to its validity, and with reference thereto said: "Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken, where property is once brought under the control of the court by seizure, or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale."

§ 39. **Same: Essential nature of proceeding.** Although the United States Supreme Court in Pennoyer v. Neff held the proceeding there taken ineffectual, it distinctly pointed out that, if the proceeding were regular, the property of such a person could be taken to satisfy a judgment entered against him. The judgment against the non-resident on a personal demand is effective, to be sure, only to the extent of the value of the property seized, and may be made use of only to allow the claimant to appropriate it to the satisfaction of his demand.

Justice Miller, in Cooper v. Reynolds (21), in stating the essential nature of the proceeding said: "First, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be

(21) 10 Wallace, 308.

issued for any balance unpaid, after the attached property is exhausted. No suit can be maintained on such a judgment in the same court, or in any other; nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such a suit, cannot proceed, unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction."

§ 40. **Same: Attachment of claim due a non-resident creditor.** As was seen in the two preceding paragraphs, courts have the power to give a personal judgment against a non-resident if he has property in the state after such property has been seized and placed in the custody of the court. The power of courts quasi in rem is not restricted, however, to cases where the non-resident has tangible property in the state. They have power to enter judgment against a non-resident without actual service of process, in cases where the non-resident has a money claim against a resident; which they first attach by notifying the debtor not to pay it to the creditor, then judgment is entered in favor of the person who has a claim against the non-resident creditor, and then the resident debtor is compelled to pay the amount due the non-resident in satisfaction of the judgment. The leading cases establishing this doctrine are stated in Conflict of Laws, § 118, in Volume IX of this work (22).

(22) Chicago, etc. Ry. v. Sturm, 174 U. S. 710; Harris v. Balk, 198 U. S. 215.

§ 41. **Same: Foreclosure of mortgages in courts of equity.** Similar in some respects to the proceedings at law for the attachment of property and debts due to non-residents is the proceeding in equity to foreclose a mortgage on land in the state. In such a case the mortgagee sues and gives notice by publication to the non-resident mortgagor. Without an actual seizure of the land as is required in the case of attachments at law, the court finds the amount of the non-resident mortgagor's indebtedness, and enters an order that, unless he pays the amount within a certain time, the property will be sold to satisfy the indebtedness. It may be seen that the object of the proceeding is similar to that in attachment cases at law, where the court finds the amount due the claimant, enters judgment for it, and allows the attached property to be sold to satisfy the amount. It differs from an attachment in that no seizure of the property is required, the fact that the property is in the state being deemed sufficient in equity to sustain the court's jurisdiction, without an actual seizure. To be sure, in such cases, the court has power, as a means of preserving the property while the suit is pending, to take possession by its receiver. This seizure is not necessary, however, to the court's jurisdiction as it is in attachment cases.

§ 42. **Divorce proceedings.** The third class of cases (§ 35, above) where the interests of a non-resident may be affected is divorce proceedings where one of the parties is non-resident. The principles here involved are discussed in the article on Conflict of Laws, §§ 119-25, in Volume IX of this work, to which the reader is referred. To this it

is only necessary to add that a divorce granted by a state, where only one of the parties to the marriage is actually domiciled, will apparently be valid in that state, even though not recognized elsewhere under the rules of Conflict of Laws.

Secton 4. Service of Process in Proceedings in Rem and Quasi in Rem.

§ 43. By publication. As has appeared in the discussion of proceedings in rem and quasi in rem, a common form of service of process upon non-residents is by publication in a newspaper. To lay the foundation for service by such a method, it must generally be made to appear by affidavit that the party sought to be thus served is a non-resident, and, if his place of residence is known, this is required to be stated, or if not known, that fact should appear. If the place of residence appears, it is usually the duty of the clerk of the court or of the plaintiff to send a copy of the notice published in the newspaper to the defendant. This precaution to give the party notice is required by statute in addition to the requirement in certain cases of a seizure of the non-resident's property.

§ 44. By delivering copy of bill and notice. Another method of serving a non-resident is by the delivery of a copy of the bill, showing the nature of the plaintiff's claim, together with a plain notice of the proceeding. This method is generally used in chancery cases only and not in law cases, except in the code states. It is statutory, as is the method of service by publication, and is often more advantageous than where publication is resorted to. It can be used only when the plaintiff is able to find the de-

fendant. A common method of procuring such service, which is usually resorted to only where the defendants are few, is for the plaintiff or his attorney to serve the bill and notice himself, as it must be delivered by some one who makes affidavit of such fact. Or, if the defendant is far removed from the place where the suit is brought, the plaintiff may send the bill and notice to any person near the defendant and have that person perfect the service and make affidavit of the fact. The express companies make a business of performing this agency.

§ 45. **By serving agent of non-resident within state.** The legislatures of some of the states of the Union have attempted to give their courts power to render a personal judgment against non-residents by serving summons on their agents. This has been attempted both in the case of individuals and of partnerships, whose members are non-residents but who have agents carrying on business for them in the state. Statutes of that character authorizing such services have, however, been held to be unconstitutional.

In Cabanne v. Graf (23) a non-resident was engaged in business in Minnesota, where he had an agent to represent him and who carried on the business. The plaintiff brought suit against him for the breach of a contract of employment. Service was procured upon him by delivering a copy of the summons for the non-resident to the resident agent. The court held such service was void because unconstitutional and not due process of law. It said: "Except as to proceedings affecting the personal

(23) 87 Minnesota, 510.

status of the plaintiff, or in rem, or as to actions to enforce liens, or to quiet title, or to recover possession of property, or for the partition thereof, or to set aside fraudulent transfers thereof, or to obtain judgment enforceable against property seized by attachment or other process, no state can authorize its courts to compel a citizen of another state remaining therein to come before them and submit to their decision a mere claim upon him for a money demand, no matter what the prescribed mode of process against him may be. An attempt to do so is not due process of law."

This mode of service may, however, be used upon corporations doing business outside of their domiciles. See Conflict of Laws, § 103 in Volume IX, and Corporations, § 140, in Volume VIII of this work.

Section 5. Testing Sufficiency of Service.

§ 46. Motion to quash. After the defendant has been served, he may appear for the limited purpose of testing the sufficiency of the service in the court in which the suit is pending. If he claims a defect appears on the face of the summons or return, he may make a motion to quash the writ (24), which, if granted, will result in the issuance of another writ known as an *alias* summons.

§ 47. Plea in abatement. If he claims that the service is insufficient because of some defect not shown upon the face of the summons or officer's return, he may plead this fact in abatement (25). Thus, where a corporation may be served with process by serving an agent, if the officer

(24) Eddleman v. Traction Co., 217 Illinois, 409.
(25) Willard v. Zehr, 215 Illinois, 148.

serves some one whom he thinks to be an agent but who is not in fact, the defendant may take advantage of this failure of service by a plea in abatement. The defect will not appear in the officer's return, as it will show a service by leaving a copy of the summons with an agent, naming him, and is thus the subject of correction by plea in abatement.

§ 48. **Default proceedings: During term when judgment entered.** The defendant may fail to appear, in which case his name will be called in open court, and, upon his failure to answer, a default will be entered against him, and a judgment on this order of default for the amount proved to be due the plaintiff. This judgment is not conclusive, however, until the expiration of the term at which it is entered. Before the expiration of the term, the defendant may appear and move the court to vacate the default within the term the judgment was entered, show a meritorious defense, and show due diligence had been exercised by him in coming into court when he did. Upon such a showing, the court may vacate the default. It may, however, refuse to do so, a matter quite largely in its discretion, and subject to review and correction by an upper court only in case of an abuse of this discretionary power. In case a defect in the service of process is shown, an additional and important element is added to induce the court to exercise its discretion freely and liberally.

§ 49. **Same: After expiration of term.** If the defendant permits a default judgment to be entered against him, when the summons is void on its face or the return shows

an incorrect or illegal service, the defendant cannot take advantage of the alleged error if he has allowed the term at which it was entered to pass without attempting to set it aside. In such a case the only method remaining in which to test the sufficiency of the service or return, in the proceeding in which the judgment was entered, is by the assistance of a reviewing court on writ of error (26). The sufficiency of the summons or of the service as shown by the return, where an alleged defect appears on the face of the summons or return of the officer, may also be tested in some other case, when it is sought to recover a judgment on the one in which the service was defective, or to take some advantage of that judgment entered on such service (27).

(26) Cline v. Patterson, 191 Ill. 246.
(27) Bank of Eau Claire v. Reed, 232 Ill. 238.

CHAPTER III.

PROCEEDINGS BEFORE JUDGMENT. THE TRIAL.

§ 50. **Filing the pleadings.** As indicated elsewhere, in proceedings in courts of record the parties apprise each other of the nature of their respective positions in the controversy by pleadings. The time at which the pleadings are required to be presented is regulated by statute or rule of court. In some jurisdictions the pleadings are filed with the clerk of the court, and in others they are served upon the opposite party as prepared. The next subsection deals with the practice of serving the pleadings.

The jurisdictions that provide for filing the pleadings differ as to the convenience to the parties. In one class the parties file only original pleadings and no copies. The adverse party is obliged to be satisfied with reading the adverse party's pleadings at the clerk's office, or, if not, to procure the clerk to prepare a copy of them for him. The other class supplies a considerable convenience to the parties by compelling each party upon filing an original to file a copy with it for the adverse party. In such jurisdictions, each party, having retained a copy of his own pleadings and having the opportunity to procure a copy of the adverse party's pleadings from the clerk of the court, in the end, when the pleadings are settled, may

have a complete record of all the pleadings in the case. The clerk also has the original set for the use of the court at the hearing.

§ 51. **Serving the pleadings.** Some jurisdictions follow a widely different practice with reference to pleadings. The attorneys prepare them, but, instead of filing them with the clerk of the court within a specified time, they serve them upon the opposite party or his attorney within some fixed time. As the process of pleading progresses, each party retains a copy of his own pleadings and receives directly from the other party copies of his pleadings. While the pleadings are being settled none of them are filed with the clerk of the court. When they are finally settled, the case is noticed for trial, is tried, and a judgment entered. Thereafter the pleadings, the verdict, and the judgment are assembled into one document, which is thereafter known as the judgment roll, and which is then for the first time filed with the court as the permanent record of the case.

§ 52. **Effect of death of sole plaintiff or defendant.** At common law all actions terminated, or, as the expression was, abated, by the death of either party before the entry of final judgment. The court no longer had before it the persons over whom it had obtained jurisdiction, and its power, so far as that suit was concerned, was therefore regarded as at an end. In many cases the cause of action itself was extinguished by death. In others it was not extinguished but survived for or against the personal representative or heir of the deceased party, according to the nature of the cause of action. But whether the cause

of action survived or not, at common law the action itself abated; and there is thus a distinction, necessary to be clearly borne in mind in order to avoid confusion, between the preservation or continuance of the particular action and the survival of the cause of action.

Under the maxim "actio personalis moritur cum persona" a cause of action for tort was extinguished by the death of either the injured party or the wrongdoer, and therefore, where either the plaintiff or the defendant in such a suit died pending the suit, not only did the action itself abate, but the cause of action was extinguished. Claims such as debts and similar choses in action were treated as property rights, which passed to the executor of the plaintiff, and for which the estate of the defendant in the hands of his personal representative was liable. The cause of action in such cases was not extinguished by death, though a pending action to enforce such a claim would abate. The cause of action in case of death pending suit upon a claim of this character, was regarded as terminated in the person in whose favor or against whom, the suit was brought, and as arising in or against the personal representative or heir, who succeeded to the right of action or liability; and it was therefore necessary to bring a new action to enforce the right in favor of or against the person who succeeded to the cause of action or liability. If the suit involved a debt and the plaintiff died, a new suit was required by his administrator. If the defendant died, the plaintiff was bound to bring suit against the defendant's administrator. If the suit involved the title to real estate, upon the death

of either party the real estate descended to his heir; and, if the decedent were plaintiff, his heir was required to bring a new suit. If he were defendant, the plaintiff was compelled to begin a new action against him.

§ 53. **Effect of death of party not a sole plaintiff or defendant.** These rules of common law procedure just stated applied, however, only in cases in which the decedent was the sole party plaintiff or defendant. If there were several plaintiffs or several defendants, the rights of survivorship often prevented the abatement of the suit. Thus, if there were two plaintiffs and one of them died, the right of action survived to the other, and thus the entire cause of action was preserved in the person who was a party to the suit, and was therefore the only person who under the circumstances had the right to sue. Where there were several defendants jointly liable and one of them died, the liability survived against the others, and the court thus had before it all who were legally necessary partes. In actions of tort against several defendants, the death of one did not abate the suit because the recovery could be against any one or more of the defendants. Because of this right of survivorship in cases of joint rights and joint liabilities, it was unnecessary to abate the suit or to make any readjustment of parties upon the death of one of several defendants. Nor did the common law allow it.

§ 54. **Changes effected by remedial statutes.** The rules of common law procedure, with reference to the effect of the death of parties pending the suit, have been universally changed by remedial statutes, which preserve the

suit and allow the representatives of the deceased parties to be substituted in their place. This, however, can be done only in actions in which the cause of action survives; for, when the cause of an action does not survive, the right upon which the suit was based is entirely extinguished by the death of the party. The statutes in some states provide that no action shall abate, where the cause of action survives, by the death of a party plaintiff or defendant, or by the marriage of a woman who has commenced an action before marriage, or against whom such an action has been begun. The death of the party is made known to the court by what is called "suggesting the death upon the record," and the court thereupon makes the order appropriate to the situation thus created.

When a sole plaintiff dies, his personal representatives are substituted in his place. When a sole defendant dies, his personal representatives may be substituted as parties, and the plaintiff may take out a summons and have service upon them requiring them to appear and defend the action. If they appear, they have the same rights of defense as the party himself would have had. If they do not appear, the plaintiff may nevertheless proceed to final judgment. Where there are several plaintiffs or defendants and any of them die before final judgment, the cause proceeds in favor of or against the surviving plaintiff or defendant, the same as if the death had occurred before suit and the survivors had been the original parties. Where there are several plaintiffs or defendants and all die, the suit may be prosecuted or defended by or against the heir, devisee, or personal representative of the last surviving plaintiff or defendant.

§ 55. **Preparation of a case for trial: The facts.** The initial step in the preparation of a case for trial is to ascertain the facts. The attorney may, in the beginning, procure a skeleton statement of the facts from his client. This may or may not be accurate, depending on the actual knowledge of the client as to what the facts are. If substantially all the facts upon which the client relies to make his case are known to him personally, and he is qualified to testify, very little then remains to be done with reference to the facts, except to probe thoroughly the memory of the client and to procure any documentary evidence upon which he relies as evidence.

Where, however, the client's claim or defense can only be established by procuring the facts from other witnesses, the work of the preparation of a case is a more extensive undertaking. The attorney, in such a case, is obliged to interrogate these witnesses, which he may do by having the witnesses come to him or by visiting them personally. This work of procuring and arranging the evidence of witnesses is an important part of the work of the preparation of a case, and is all done outside the court room. Part of this may be done at the office of the attorney, but some of it must necessarily be done out of the office; as persons who will be important witnesses are sometimes unwilling to take the time and submit to the expense and inconvenience of visiting an attorney at his office to relate to him what they know about the case.

§ 56. **Same: Depositions and documents.** Should any of the persons whose testimony is desired be non-residents, so that they cannot be compelled to attend by sub-

poena, it is necessary to procure the depositions of such persons. As a rule, this method of producing evidence is not resorted to if it can possibly be avoided. Jurors are used to obtaining information by hearing men detail facts, and are not used to having documents read to them and trusting to their memories to recall what has been thus read. For this reason, and because the appearance of the witnesses on the witness stand attracts the juror's attention and interests them, it is generally thought that the testimony of a witness in open court is more desirable than his testimony in a deposition.

Entirely aside from the statements of witnesses, it is essential that the attorney make a careful preparation upon all documents having a bearing upon the case, and, if any are in possession of the adverse party, it is his duty to notify him to produce them at the trial.

§ 57. **Same: The law and theory of the case.** From the time that the client first presents a few meagre facts to the attorney, and before he has gleaned from the evidence a definite conception of what can be proved, he is engaged in examining the law to ascertain whether, under any possible theory of the facts, the client has a cause of action or defense. It is essential, also, during the progress of the examination of the witnesses, that he determine from the rules of law whether the witnesses he may offer or those his adversary may offer to prove the facts are competent to testify. Furthermore, he should be prepared on the law as to what part of the evidence is competent.

After examining the facts and the evidence which can be presented to establish them, and having familiarized himself with the law, it is necessary for the lawyer to formulate what is known as the theory of the case. By this is meant that he should select and arrange the details of facts and evidence, so that one shall naturally seem to follow another and all blend to support one central conclusion. This conclusion from the facts should be consistent with all of his evidence, and should explain all the substantial facts which can be established by the opponent. The conclusion drawn from the facts, must, of course, be such as to warrant a recovery, in case the advocate represents the plaintiff, and a defense if he represents the defendant. The same set of facts may be capable of supporting more than a single conclusion, under one of which a cause of action or defense could be made out and under another it could not. To do this it is essential that the advocate be familiar with the law applicable to any conclusion to be drawn. If so, he will strive to array the facts so as to make the conclusion favorable to him be adopted, whether by court or jury.

Having a substantial theory upon which to explain the facts, this is to be used in making the opening statement to the jury, in the presentation of the evidence, in the argument to the jury at the conclusion of the evidence, and in the instructions to the jury, if he is bound by the practice of the jurisdiction to present the instructions in writing to the court.

§ 58. **Function of court and jury.** If the defendant is properly served, or if he does not desire to test the val-

idity of his service, but relies upon a defense on the merits, he is obliged to plead or demur. Upon a demurrer to the declaration, its sufficiency to permit the plaintiff to recover as a matter of law is tested. This is a matter purely for the court. If the court finds the declaration sufficient on a demurrer, the defendant is obliged to plead. The same process of testing the plea is open to the plaintiff. A similar method is pursued with reference to subsequent pleadings, until the pleadings are settled and the case at issue. After this, the case is ready for trial.

The functions of court and jury are sharply separated at the hearing of the evidence on the trial, the former sitting to decide questions of law, such as what evidence is proper for the consideration of the jury and whether witnesses are competent to testify. The jury, on the other hand, sits to pass upon the facts presented to them by the witnesses and other evidence. Thus the functions of court and jury are separated when the case is tried by a jury. Parties may, by agreement, waive a jury trial, in which event the judge sits to pass both upon the facts and the law. A trial where a jury has been waived is a simple matter, consisting merely of the admission of the evidence and the passing upon it by the judge. A trial by a jury is a rather more complicated proceeding, and we shall examine some of its features.

§ 59. **Impanelling the jury.** The jurors are selected from the male inhabitants of the county having qualifications fixed by statute. Sometimes they are chosen through a jury commission, sometimes by selection from

the poll lists by the sheriff. A certain number are summoned to attend the court, and, from the number thus summoned, a selection is made for the trial of each case. When a case is called for trial, the first step is to impanel the jury. The clerk or bailiff of the court has the names of the jurors upon cards, and draws from these twelve men who take their seats in the jury box. The respective parties then have the right to examine the jurors thus called, for the purpose of determining their qualifications to serve as jurors, and also for the purpose of exercising the right of challenge.

§ 60. **Forms of challenge of jurors.** There are three distinct methods of challenging the right of a juror to serve: (1) Challenge to the array. (2) Challenge for cause. (3) Peremptory challenge.

The first form of challenge gives a party a right to object to the entire body of jurors, known as the panel, because of some irregularity or omission in the manner in which the panel was selected (1). If such irregularity is made to appear, it is the duty of the court to discharge the jury and to have another summoned to try the case. If there is no objection to the array, the parties enter upon the selection of the persons who are to try the cause, from among those who have taken their places in the jury box. In doing so, each party is entitled to challenge jurors for cause. What is cause for challenge is brought out on the examination of the jurors in what is called the *voir dire*. This examination may disclose that a certain juror does not possess the statutory require-

(1) Lincoln v. Stowell, 73 Illinois, 246.

ments for jury service, such as citizenship, residence, freedom from bias, and so forth. If not, and the court's attention is called to it by a challenge for cause, the court is bound to excuse him. This is done without prejudice to the rights of the party challenging him to challenge other jurors for cause. The third form of challenge is that of peremptory challenge. Each party is allowed by law a certain number of challenges without giving any reason for the same and without the existence of any reason. Usually they are used on account of private opinion or a suspicion by the challenger that the juror will not be impartial or will be an inefficient juror.

The party who first examines finds twelve jurors who are satisfactory to him, after challenging all he thinks proper and best. He then tenders these to the other side, by whom also an examination is made and the right of challenge exercised. If some of the jurors are challenged, new ones are called to take their places and the new ones accepted are tendered to the other side, where the same process is repeated until both parties are satisfied or have exhausted their power of challenge, when the jury is accepted and sworn to try the issues.

§ 61. **Opening statements to jury.** As soon as the jury is impanelled and sworn, the opening statements are made by counsel for the respective parties. This is not supposed to be an argument of the case in any way, but a mere presentation of the facts which the party expects to prove, and an outline of the evidence by which the principal facts are to be supported. The plaintiff makes his opening statement to the jury first, before any evidence

is introduced. At his conclusion, the defendant may at once make his statement to the jury of what he expects to prove and an outline of the facts of his case, or he may reserve the right to make his statement at the conclusion of the plaintiff's evidence.

§ 62. **Introduction of evidence. Requests for direction of verdict.** After the opening statements are made to the jury, so that both the court and jury have some conception of what the case is about, and so that the evidence introduced during the trial will be more intelligible to them, then the witnesses are called and examined and the documentary and other evidence presented. Exceptions are taken by counsel to the rulings of the court regarding evidence and other matters, which may later be made the basis for motions for a new trial, or for a reversal of the case in an upper court. See §§ 68, 70, 75, below. At the conclusion of all the evidence introduced by either party, the other party may request the court to direct the jury to bring in a verdict for him, on the theory that the opposite party has not made a case upon the evidence. If the court refuses to grant the request, the next step is to argue the facts to the jury.

§ 63. **Argument to jury.** The arguments to the jury consist of a statement by the respective parties as to the views they take of what the evidence proves, or tends to prove, the inferences which each draws from the evidence introduced, explanations of inconsistent and damaging evidence, and arguments upon the credibility of witnesses. The object of these arguments is to influence the jury, and to assist them in arriving at a correct verdict

by directing their attention to the vital points in the case. Upon the completion of the arguments, the court instructs the jury as to the law applicable to the facts, and the jury is then sent to a private room to deliberate upon a verdict.

§ 64. **Instructions to jury: Written instructions on law only.** It is one of the functions of the judge to instruct the jury. The states of the Union may be divided into two classes with reference to the character of the judge's instructions. In a majority of the states the judge is limited to instructing the jury exclusively upon the law applicable to the case. In such jurisdictions it is usual to require that his instructions be given in writing. These are usually prepared by the attorneys, in advance of the trial or during its continuance, and are submitted to the court by both sides, the attorney for each side presenting his theory of the case therein. The judge examines them, selects those which in his opinion are applicable to the case and marks them "Given"; those that in his opinion are inapplicable he marks "Refused." The former he reads to the jury and they constitute his instructions.

§ 65. **Same: Oral instructions, with judge's opinion as to evidence.** In England, in the Federal courts, and in a minority of the states of the Union, the judge is not limited exclusively to instructing the jury upon the law . In those jurisdictions he is generally permitted to give oral instructions; and, while it is his duty to instruct as to the law, he has also the power to make a general statement of all the evidence introduced, to comment upon it, to recapitulate it, to give his opinion as to what some part

or even all of it tends to prove, and even to express his opinion as to the credibility of witnesses, provided he also instructs them that they are not bound by his opinion on such matters, but that they are to arrive at their own conclusions from the evidence. In those jurisdictions the judge occupies a much more difficult and important position in that he is obliged, in order to sum up the evidence intelligently, and to inform the jury what the evidence tends to prove, to give closer attention during the progress of the case to the evidence as it comes from the witness stand; and also to form his own opinion as to the credibility of witnesses, and the advisibility, from the conditions of the testimony, of making any statement in reference to all or some part of it to the jury.

§ 66. **Same: Illustration of latter practice.** This practice was commented upon in Kerr v. Modern Woodmen (2). A suit was there brought by a beneficiary in an insurance policy to recover the amount thereof. The death of the insured had been caused by a pistol shot, and, being found dead, the court and jury were called upon to decide whether he came to his death by accident or through suicide. If through the latter the company was not liable, the policy providing that no liability should result if the insured died by his own hands, whether sane or insane. The jury found in favor of the company; the beneficiary on a writ of error complained of the action of the lower court in giving instructions to the jury. With reference to them the reviewing court said:

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(2) 117 Federal, 593.

"The sole issue in the case was whether the death of Kerr was the result of accident, casualty, or mishap, or of suicide. The judge discussed the evidence, and in respect to some matters stated or intimated his own impressions or conclusions as to minor facts proven or not proven by the evidence. But he carefully and repeatedly told the jury that it was their province and duty to find the facts from the evidence, and that they were not bound by his conclusions or intimations in respect to matters of fact. That the judge may properly state to the jury his own opinions as to what facts are proven or not proven by the evidence in the case on trial, if he also instructs them that they are not bound by his opinions on such matters, but that it is their duty as jurors to consider the evidence, and find the facts therefrom, has been the uniform holding of the Federal courts."

§ 67. **Verdict and judgment.** If the jury succeeds in arriving at a verdict, the same is returned into court, read by the clerk, and recorded. Upon the jury's verdict, in case of a jury trial, and upon the court's finding of facts, in a case tried by the judge, the court renders a judgment. This is merely applying the law to the facts found by the jury, and gives the relief the case calls for.

§ 68. **Motion for new trial.** This motion, one of a number permissible during the progress of a trial, is properly made after the jury has returned a verdict, been discharged, and before judgment has been entered. It may be made by the party in whose favor the verdict was rendered, if it is unsatisfactory to him, as well as by the

party against whom the jury made the finding. The object of the motion at common law is to procure a retrial of the case before another jury, as a result solely of the action of the lower court, and without the assistance of a court of correction. If the lower court refuses to grant it, no point can be made in a reviewing court on the bare refusal, as the matter of granting or refusing a new trial is discretionary with the trial court. This is the common law practice, and the practice in the Federal courts.

§ 69. **Grounds for new trial.** In determining whether or not a new trial should be granted the court considers the grounds which would warrant such action. Various errors may be cause for a new trial. The judge may have erred in failing to allow a challenge to the array of the jurors, he may have erred in refusing to recognize a challenge for cause, he may have admitted improper or excluded proper evidence, he may have permitted an incompetent or refused to permit a competent witness to testify, he may have given an erroneous or refused to give a proper instruction, any one of which might be urged as a point of law upon which to procure a new trial. The rulings on these points are also reviewable above, as ground for a reversal of the judgment and a new trial.

Aside from these points of law that may be urged in support of the motion, it may be insisted that the jury's verdict is contrary to the facts and the weight of the evidence. Upon such a contention, the judge examines the facts and evidence, weighs it, and determines upon which side the preponderance lies. His decision that the verdict is in accordance with the preponderance of the evidence is not subject, however, to review as such.

§ 70. Procedure respecting motion for new trial. If the judge grants a new trial that case ends. An appeal cannot be taken from an order of the trial judge granting a new trial. Such an order still retains its character of a discretionary order and is not reviewable anywhere.

In the majority of the states of the Union the common law rule, as outlined has been changed by statute so that the action of a trial judge in passing unfavorably upon the facts and in denying the motion for a new trial, which is the proper motion to call for a review of the facts, is reviewable. That is to say, a reviewing court will, if called upon to do so, examine the facts to determine whether the trial court committed an error with reference to them. In those states the reviewing courts review the points of law to determine whether the lower court erred in its rulings during the progress of the trial. This is also done under the common law practice. Besides reviewing the case upon the law, it reviews it upon the facts and evidence to see whether the trial judge erred in determining that the verdict was in accordance with the preponderance of the evidence. This latter point can be reviewed only if a motion for a new trial was made in the court below, was overruled, and an exception to the ruling saved by the aggrieved party. This is the general statutory practice with reference to the motion for a new trial in the reviewing courts.

CHAPTER IV.

PROCEEDINGS AFTER JUDGMENT.

SECTION 1. ENFORCEMENT OF JUDGMENTS AND DECREES.

§ 71. **Judgment and execution.** The final order of a court of law, determining the rights and relief of the parties is called a *judgment;* such an order of a court of equity is called a *decree.* The formal requisites of judgments are fully discussed in the article on Judgments in Volume X of this work. Decrees in equity vary in form, depending upon the relief granted, are drafted by the solicitor for the sucesssful party, and no particular form is prescribed in which they must be entered, as in the case with judgments at law.

After the judgment is obtained, if its execution is not stayed, pending an appeal or writ of error, an execution is issued and placed in the sheriff's hands, upon which a levy is made on defendant's property, if any can be found, and it is sold to satisfy the judgment. The procedure of an execution and sale is fully discussed in the article on Execution, Attachment, and Garnishment in Volume X of this work.

§ 72. **Supplementary proceedings.** Certain kinds of property held by one against whom a judgment or decree has been procured are not subject to be taken under

an execution. Those forms may be most comprehensively described by the term intangible assets, such as bonds, notes, contracts, an equitable interests in real and personal property. It further frequently happens that judgment debtors conceal the property they own, which is subject to execution. It is not an uncommon occurrence to have the sheriff return the execution indorsed "No property found", either because the debtor has concealed his tangible property, or because the property he owns is not subject to be taken under the execution. If the former is the case the judgment creditor may, in states where statutes have been passed giving him further assistance from the court that entered the judgment, cause the debtor to appear before the court to testify as to where his property is, and, if any is thus discovered, he is compelled to surrender it to the sheriff to be applied on the judgment. These proceedings are called *supplementary proceedings* and differ from those to be described in the following subsection in that the court itself, where the judgment was rendered, again lends its active assistance to aid the judgment creditor in realizing on his claim. They are parts of the same case (1) and supplement the assistance courts usually render through their ministerial officers as previously described.

§ 73. **Same: Equitable execution.** If the judgment debtor's property is of a character not subject to be taken under an execution, this fact may be made to appear in an examination of the debtor in the supplementary proceeding mentioned. It may also be made to appear from

(1) Barker v. Dayton, 28 Wisconsin, 367.

such an examination that he has conveyed his property to another to avoid having it taken to satisfy the judgment. If it is discovered that the debtor has property not subject to execution, or has conveyed his property to avoid its being taken under an execution, i. e., to defraud his creditors, the judgment creditor may file a bill in a court of equity known as a *creditor's bill.* It is often called equitable execution, but is in reality and strictness not execution (2) in the ordinary sense of that term. It is the name applied to a proceeding in equity adapted to reach assets not subject to the ordinary execution, either because the debtor's property is intangible, or because he has placed it in the hands of third persons to defraud his creditors. Under such a proceeding the court may take possession of property that cannot be taken under an execution, sell it, and apply the proceeds to satisfy the judgment (3). The creditor's bill is also resorted to, in jurisdictions that do not have the supplementary proceedings, for the purpose of discovering assets that are not subject to execution or have been conveyed in fraud of creditors. Upon such an examination of the debtor, he may be compelled to answer as to his property, and, for a refusal to do so, he may be punished for a contempt of the court by being placed in jail (4).

SECTON 2. JUDICIAL REVIEW OF COURT PROCEEDINGS.

§ 74. Methods of obtaining review of decisions of lower courts. In the early history of the law all suits at law

(2) In re Sheppard, 59 Law Journal, Chancery, 83.
(3) Myers v. Amey, 21 Maryland, 302.
(4) Berkson v. People, 154 Illinois, 81.

were reviewable by *writ of error,* and by writ of error only. This was a proceeding begun in an upper or reviewing court as a new suit. It was, in legal effect, a suit by the defeated party against the successful party and the court which had given the judgment. The lower court is proceeded against when it is ordered to send up the record of the case. Suits in equity, on the other hand, were reviewable by *appeal.* This method of review did not partake of the character of a new suit, but was rather a continuation of the proceeding in the court below. No service of process was required, as the party who was successful was bound to follow the proceeding, after the appeal was perfected below. As a result, he was brought into the upper court with the case, and it was reviewed as though it were merely a continuation of the case in the court of original jurisdiction.

In the Federal courts, these methods of review, the writ of error being used only to review a law case and the appeal to review an equity case, have been continued to the present time (5). The state courts of many states have been permitted, by statute, to depart from this practice of reviewing a suit at law by writ of error only and an equity case by an appeal. In some, either a suit at law or in equity may be reviewed by either a writ of error or an appeal (6). More commonly, perhaps, only an appeal is authorized in either case.

§ 75. **Record of lower court.** In the early history of the law, the only parts of a proceeding in a suit at law that

(5) United States v. Emholt, 105 United States, 414.
(6) Anderson v. Steger, 173 Illinois, 112.

were subject to review were those that existed in the process, pleadings, and judgment. If the court below committed an error in sustaining or overruling a demurrer, or in entering a judgment on insufficient and defective pleadings, the reviewing court could review these errors. The record did not include what occurred before the jury. The rulings as to the qualifications of jurors, the competency of witnesses, the admissibility of the evidence, and upon motions for peremptory instructions or other motions, did not appear in the record, and although prejudicial error was committed in these respects, no review could be procured on the rulings.

By the assistance of statutes, however, it became possible for the aggreived party to request that the judge certify to the various rulings he made, to which the party, against whom they were made, excepted (7). These separate rulings and exceptions were then made a part of the record, and became known as the bill of exceptions. Upon the record, consisting of the process, pleadings, judgment, and bill of exceptions, the reviewing court could review not only what occurred before the trial judge in the absence of the jury, but what occurred before the jury in the way of rulings. If the rulings before the jury were incorrect and erroneous, a reversal would result. The modern practice universally allows a review upon rulings shown by bill of exceptions. As a consequence, the entire action of the lower court is subject to supervision and correction by the court of review.

§ 76. Jurisdiction of reviewing courts. The question of

(7) Yarber v. Chicago & Alton Railway Co., 235 Illinois, 589, 598.

the jurisdiction of the parties and of subject matter of the cause, for the reviewing courts, is similar to that of the courts of original jurisdiction. To determine what court has jurisdiction of the subject matter, where there is more than one reviewing court, the state statute or constitution must be consulted. The jurisdiction of the person, in cases where a review is sought by appeal, is of no importance, as the parties follow the cause; and, if the court below had jurisdiction, no question can be raised as to it on appeal. With reference to the writ of error the rule differs however; as stated above, this is a new suit instituted by the aggrieved party, and, being such, the other party must be notified of it, that is, he must be served with process (8). It is thus quite analogous to the service of process in lower courts, that the reviewing court procures jurisdiction of the person of the defendant in error, as the successful party below is known in the reviewing court. If the defendant in error is a non-resident, service may be procured by publication, as the judgment of the lower court is looked upon as having a situs in the state sufficient to permit service by publication upon a non-resident, as in cases where he has property in the state (§§ 35-36, above).

§ 77. **Procedure in reviewing courts.** In the reviewing courts no further pleadings are required. The record of the lower court is acted upon, and, in order to draw the reviewing court's attention to the particular parts of the record, in which it is claimed the lower court committed prejudicial error, assignments of error are required.

(8) Wiley v. Neal, 24 Nebraska, 141.

These inform the court and the opposite party what points are relied upon to procure a reversal. After the record of the lower court has been filed above, and the assignments of error have been presented, then the party asking the aid of the reviewing court presents a brief of the points upon which he relies to procure a reversal. Sometimes this is accompanied by an argument. In the brief the authorities relied upon are cited and the rules of law enunciated. In the argument the rules are discussed and the authorities commented upon. The successful party replies to the brief and argument of his opponent in a similar manner, and, in some courts, the moving party may file a reply brief. The briefs of counsel are intended to enlighten the court upon the law and the facts in the case, having in view particularly those points upon which it is claimed the lower court erred. The court may or may not hear oral arguments according to its rules. After a consideration by the court of the briefs and arguments, if any, a conclusion is reached with reference to the lower court's rulings. If it is found that the lower court did not commit an error, the judgment or decree is affirmed. If, on the other hand, error is found, it is reversed. It may be remanded or not, depending upon the practice in the jurisdiction and upon the nature of the order of the reviewing court. If remanded, it is accompanied by an order to the lower court to proceed in conformity with the judgment of the reviewing court.

In several states there are intermediate reviewing courts to which an appeal or writ of error is taken in the first instance from the trial courts, and, under statutory

conditions, further appeals or writs of error may be taken from these intermediate courts of review to the highest courts of the jurisdiction. The same is true of the Federal courts.

§ 78. **Proceedings in lower court after review.** According to the procedure at common law, reviewing courts are merely courts of correction. Their function is to examine the proceedings below upon matters of law only, matters of fact being left exclusively to the jury and trial judge, as indicated elsewhere. If, upon a review of the proceedings, it is found that an error of law was committed, the judgment of the lower court is reversed and the case remanded for a new trial.

The new trial is conducted on the same lines as the original trial; a new jury is impanelled, the jurors are examined on their voir dire, the opening statements are made by counsel to the jury, witnesses are heard and evidence introduced as at the former trial . The only substantial difference that occurs is with reference to the point or points upon which the judge erred in the first trial. If he excluded what the reviewing court held to be material evidence, or admitted incompetent evidence, this error is corrected. When the evidence which he excluded before is offered, he admits it to the jury. If at the first trial he admitted incompetent evidence, according to the reviewing court's opinion, he excludes this. The error committed at the first trial may have been with reference to an instruction to the jury. At the new trial instructions are given subsantially as they were at the first, except that any error therein that occurred at the first trial is corrected.

Upon the completion of the second trial the defeated party again has the right to ask the reviewing court to examine the proceedings for error, and a third trial may result in which the proceedings again follow substantially the outline given above. This may continue until the trial court proceeds without committing any substantial error. As high as seven successive trials have thus been had in a single suit.

§ 79. Statutory enlargement of powers of reviewing courts. By statute, the function of the reviewing courts is greatly enlarged by the fact that the trial judge's ruling in denying a motion for a new trial is made reviewable. As stated elsewhere (§ 68, above), the action of the judge at common law in granting or refusing a new trial was a discretionary matter and not open to review. The statutes have not caused the exercise of that discretion in granting the motion to be reviewable, but have caused the refusal to grant the motion to be subject to review. It is here that the reviewing courts are empowered to examine the facts of the case to see whether the lower court erred in its conclusion that the verdict was in accordance with the preponderance of the evidence, as well as to examine the rulings upon law made during the course of the proceedings. As an adjunct to this function of examining the facts, they are empowered to enter up a finding of facts contrary to that of the jury and trial judge, and to enter a final judgment thereon. They may even issue execution as a trial court may. This is, however, a subject of statute entirely. In such cases the cause is not remanded and no other proceedings are necessary in the trial court.

LEGAL ETHICS [1].

CANONS OF AMERICAN BAR ASSOCIATION.

1. Preamble.

In America, where the stability of courts and of all departments of government rest upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

2. The Canon of Ethics.

No code or set of rules can be framed which will particularize all the duties of the lawyer in the varying

(1) This code of professional ethics was adopted by the American Bar Association at Seattle, Washington, August 27, 1908. The Association also adopted the recommendation of the special committee having charge of drafting the code to the effect that the subject of professional ethics be taught in all law schools, and that all candidates for admission to the bar be examined thereon.

phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned:

§ 1. **The duty of the lawyer to the courts.** It is the duty of the lawyer to maintain towards the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

§ 2. **The selection of judges.** It is the duty of the bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political, or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.

§ 3. **Attempts to exert personal influence on the court.** Marked attention and unusual hospitality on the part of a lawyer to a judge, uncalled for by the personal relations of the parties, subject both the judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the judge's station, is the only proper foundation for cordial personal and official relations between bench and bar.

§ 4. **When counsel for an indigent prisoner.** A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

§ 5. **The defense or prosecution of those accused of crime.** It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done.

The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

§ 6. Adverse influences and conflicting interests. It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

§ 7. Professional colleagues and conflicts of opinion. A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to co-operate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the business of another lawyer, are unworthy of those who should be brethren at the bar; but, nevertheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.

§ 8. **Advising upon the merits of a client's cause.** A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which justice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

§ 9. **Negotiations with opposite party.** A lawyer should not in any way communicate upon the subject of

controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

§ 10. Acquiring interest in litigation. The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.

§ 11. Dealing with trust property. Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and except with the client's knowledge and consent should not be commingled with his private property or be used by him.

§ 12. Fixing the amount of the fee. In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider: (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely

to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other business while employed in the particular case or antagonisms with other clients; (3) the customary charges of the bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In fixing fees it should never be forgotten that the profession is a branch of the adminstration of justice and not a mere money-getting trade.

§ 13. **Contingent fees.** Contingent fees lead to many abuses, and where sanctioned by law should be under the supervision of the court.

§ 14. **Suing a client for a fee.** Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition, or fraud.

§ 15. **How far a lawyer may go in supporting a client's cause.** Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper dis-

charge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintentance and defense of his rights, and the exertion of his utmost learning and ability," to the end that nothing be taken or be witheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

§ 16. Restraining clients from improprieties. A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards courts, judicial officers, jurors, witnesses, and suitors. If a client persists in such wrongdoing the lawyer should terminate their relation.

§ 17. **Ill feeling and personalities between advocates.** Clients, not lawyers, are the litigants. Whatever may be the ill feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel, which cause delay and promote unseemly wrangling, should also be carefully avoided.

§ 18. **Treatment of witnesses and litigants.** A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

§ 19. **Appearance of lawyer as witness for his client.** When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

§ 20. **Newspaper discussion of pending litigation.** Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any ex parte statement.

§ 21. **Punctuality and expedition.** It is the duty of the lawyer not only to his client, but also to the courts and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

§ 22. **Candor and fairness.** The conduct of the lawyer before the court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a text-book; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved; or, in those jurisdictions where a side has the opening and closing arguments, to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A lawyer should not offer evidence, which he knows the court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law, charged, as is the lawyer, with the duty of aiding in the administration of justice.

§ 23. **Attitude toward jury.** All attempts to curry favor with juries by fawning, flattery, or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.

§ 24. **Right of lawyer to control the incidents of the trial.** As to incidental matters pending the trial, not affecting the merits of the cause or working substantial prejudice to the rights of the client, such as forcing the

opposite lawyer to trial when he is under affliction or bereavement, forcing the trial on a particular day, to the injury of the opposite lawyer, when no harm will result from a trial at a different time, agreeing to an extension of time for signing a bill of exceptions, cross-interrogatories, and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

§ 25. **Taking technical advantage of opposite counsel—agreements with him.** A lawyer should not ignore known customs or practice of the bar or of a particular court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of court.

§ 26. **Professional advocacy other than before courts.** A lawyer openly, and in his true character may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding to influence action.

§ 27. **Advertising, direct or indirect.** The most worthy and effective advertisement possible, even for a young

lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not per se improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional. It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisement for business, by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's positions, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable.

§ 28. **Stirring up litigation, directly or through agents.** It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship, or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit, or to breed

litigation by seeking out those with claims for personal injuries or those having any other grounds of action, in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attaches, or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick, and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred.

§ 29. **Upholding the honor of the profession.** Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

§ 30. **Justifiable and unjustifiable litigations.** The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the court as to the legal merits of his client's claim. His appearance in court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

§ 31. **Responsibility for litigation.** No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what business he will accept as counsel, what causes he will bring into court for plaintiffs, what cases he will contest in court for defendants. The responsibility for advising questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

§ 32. **The lawyer's duty in its last analysis.** No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive, nor should any lawyer render, any service or advice involving disloyalty to the law, whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or

betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

APPENDIX A.

EVIDENCE.

§§ 2, 3. What is the relation, if any, between the pleadings used in a cause, and the evidence adduced at the trial?

§§ 9, 10. Which kind of evidence is entitled to more weight, circumstantial evidence, or direct evidence?

§§ 12, 13. What was the relation between the development of the common law jury system, and of the law of evidence?

§ 15. What is meant by relevance? What is meant by competence?

§ 16. In an action of tort for a wrongful taking a witness offers to state that his brother told him that he saw the defendant take the property. Is the evidence relevant? Is it competent?

§ 18. A manufacturer was sued by one of his employes for injuries sustained by the latter in being caught in a moving belt, the question being whether or not the employer was negligent in allowing the belt to be operated in the manner in which it had been. The plaintiff offers to show that shortly after the accident the defendant placed a guard around the belt. Is the evidence relevant?

In the same case, would it be relevant to show that the accused carried liability insurance?

§§ 19, 20. In a trial for murder, is it relevant to show that the deceased had twice served long terms in the penitentiary for larceny?

In the same case, would it be relevant to show that the accused, after his arrest, was threatened with lynching by a mob?

§§ 21, 22. In a suit against a milk dealer for using artificial preservatives in his milk, thereby causing the illness of plaintiff's child, the issue was whether or not the substance used was harmful. Is it relevant to show that other children who drank milk sold by the defendant also became ill?

§ 23. An action was brought against a city for injuries received by the plaintiff in falling over a defective sidewalk, the issue being whether or not the sidewalk, at the place of the accident, was out of repair. Is it relevant to show that on the date of the accident the sidewalks in many other places in the city were out of repair? Is it relevant to show that the sidewalk was out of repair at other places in the same block?

§ 24. In a prosecution for receiving stolen property, knowing it to have been stolen, the defense being that the accused did not know the property had been stolen, would it be relevant to show that the accused had received other stolen property under similar circumstances?

§ 26. In a suit against a county for injuries sustained by a pedestrian by reason of a defective foot-way over a bridge, would it be relevant to show other similar accidents at the same place, and if so, upon what theory?

§ § 27, 28. In an action against a street railway company for damages resulting from a collision, the issue being the motorman's negligence, it appears that as soon as the danger became apparent the motorman applied the air brakes to their fullest capacity and opened the sand box, but that his efforts failed to stop the car because of defects in the apparatus which were unknown to him, whereas reversing his motors might have prevented the accident. Is it relevant to show that the course pursued by the motorman is the course ordinarily pursued by others under similar circumstances? Is it relevant to show that the motorman was ordinarily a careful man?

§ 29. In a suit by a physician for compensation for his services, under what circumstances would it be relevant to show the customary fee charged by other physicians in the community for similar services?

§ § 30-33. In a prosecution for larceny several witnesses testify as to the commission by the accused of the acts constituting the crime. Is it relevant to show that the accused has always borne the character of an honest man? Is it relevant to show that his character is bad?

In the preceding case, in an attempt by the defense to show the good character of the accused, one witness offered to testify that he did not know the accused personally, but that he lived in the same community and knew the reputation which the accused bore for honesty. Another offered to testify that he knew nothing of the accused's reputation, but that in his own opinion the accused was honest. Is the testimony of either witness admissible, and if so, of which?

In the same case, would it be relevant to show the reputation of the accused in the community for great generosity? For considerate treatment of his servants and employes? For prompt payment of his bills? For honesty in his dealings?

§ 34. Suppose that the case considered under § §30-33 above, instead of being a prosecution for larceny, had been a civil action by the owner of the property against the alleged wrongful taker. Which, if any, of the kinds of evidence considered, would have been admissible?

§ 40. A confession was induced by fear inspired by a priest in the mind of the accused that if he did not confess, his soul would not repose in peace. Is the confession admissible?

§ 41. A prisoner accused of murder was induced to confess by threats and coercion, and in his confession he gave various details of how the crime was committed and its evidences concealed. Acting on the information so obtained, the police authorities found blood-stained articles of the prisoner's wearing apparel in the place where he had hidden them. Can this fact be shown on the trial?

§ 43. A prisoner was induced to sign a written confession by means of strong pressure brought to bear upon him by the police, which, however, was not quite sufficient to invalidate the confession. Afterwards he repudiated the confession, and, upon the trial, produced a number of credible witnesses who swore to an alibi. If the circumstances regarding the signing of the confession were shown to the jury, should they disregard the confession?

§ § 44, 45. An action was brought by a merchant to recover for the price of goods alleged to have been sold and delivered. The defense was that the goods had not been received. Some time before the trial the defendant had intended to urge as a defense that the goods were received, but were not as represented, and he stated to a friend that such was the fact. Can the statement be shown, as evidence tending to prove a delivery of the goods?

§ 47. In a prosecution for receiving stolen property knowing it to have been stolen, would it be admissible to show that when the accused was apprehensive of being arrested, he attempted to destroy the property?

§ 54. In a suit involving a dispute over the boundaries to a piece of land one of the parties offered to show that the person from whom the other derived title had said, at a time when he still owned the land, that he knew that his line fence was not in the right place. Can this statement be shown as an admission? Could it be shown if it had been made at a time after the person making it had parted with his interest?

§ § 58-65. In an action brought by a large department store for payment for goods sold to the defendant on credit at various

times during a period of several months, how could the sale and delivery of one of the articles be proved if no salesman had any personal recollection of having sold it? How could the delivery of another article be proved if no driver had any personal recollection of having delivered it?

§ 67. What is a deposition?

§ 72. Would a federal statute allowing depositions to be used against the accused in prosecutions in the Federal courts be unconstitutional?

In a criminal prosecution is it competent too introduce testimony against the accused given by a witness in a former trial, if the witness has since died; or has moved from the jurisdiction?

§ § 74, 75. Is it competent to show declarations of a son as to the date of marriage of his parents? Or of a husband as to the age of his wife's parents?

§ 82. In a civil action against a physician for mal-practice resulting in death, is it competent to show the facts relating to the death by means of dying declarations of the deceased?

§ 83. In a prosecution for attempted homicide, the victim having recovered from his injuries, would it be competent to show the facts of the assault by declarations made by the victim at a time when he had thought that he was dying?

§ 85. What is meant by res gestae?

§ § 86, 87. In an action against a city for a death resulting from injuries alleged to have been sustained by the deceased in falling upon a defective sidewalk, the issue was the cause of the accident. The plaintiff offered to show that the deceased was found lying upon the sidewalk less than a minute after he had fallen, and stated then that he had fallen over a loose plank. Also, that a half hour later, after he had been removed to a hospital, he had made the same statement. Is either statement admissible?

§ § 88, 89. In the preceding case, in order to prove the character of the injuries sustained by the deceased, would it be competent to show that after he had been removed to the hospital he had said to his wife that in falling he had struck upon his head, and that his head hurt him, and that he felt dizzy?

§ 90. Would it ever be competent to show, in any kind of action, that a party to the action had declared that he had served three full terms as president of the United States?

§ § 91, 92. In an action against a street railway company for a wrongful killing, one of the issues was as to the proper identification

of the body which was found upon the defendant's tracks, it appearing that the person who was supposed to have been killed had resided in another town a hundred miles away. Would it be competent to show a declaration by the supposed decedent, made the day before the accident, that he intended to visit, on the next day, the town where the body was found?

§§ 93, 94. What is meant by the "best evidence" rule?

§ 99. A lease of an apartment in an apartment house was signed by the lessor and the lessee, and attested by two witnesses. Afterwards an action was brought on the lease by the lessor against the lessee for rent, and it appeared that one of the attesting witnesses was dead, and the other was out of the jurisdiction. How could the execution of the lease be proved?

§ 101. What is meant by the "parol evidence rule"?

§§ 102, 103. An action was brought by a manufacturer of harvester machines for the price of a machine sold to the defendant under a written contract. The written contract being introduced in evidence and specifying a price of $500 for the machine, can the plaintiff show that in addition he was to receive $35 for alterations made in the machine to suit the defendant's special requirements?

§§ 105, 106. Defendant bought of plaintiff a stock of automobile tires under a contract of sale which said nothing as to the time of payment, but specified the price per tire for the different sizes. On an action being brought by plaintiff against defendant for a balance alleged to be due on the contract can defendant show, on the trial, a trade custom that he should be allowed a discount of 5 per cent. for cash payment?

§ 108. In an action by a coal company for coal bought by the defendant, the sale and delivery being evidenced by coal wagon driver's receipts signed by the defendant, each receipt stating merely the number of tons delivered and the price per ton, would it be competent for the defendant to show an oral warranty made by the coal company, through its president, that the coal would burn without making smoke?

§ 110. A will devised to each of two of the testator's sons an undivided third interest in a certain piece of realty. Would it be competent to show, by declarations of the testator, that he had meant to give to the two sons each a half interest in the land in question?

§§ 114-116. A testator bequeathed a sum of money "to Mary Straub." There were two women of that name living in the community where the testator had resided. Would it be competent to

show that one of them had been well known to the testator, while the other had been a stranger to him? Could it be shown that he had used the name Mary Straub by mistake, having intended the bequest for Mary Lee?

§ 117. In an action upon an oral contract, the issue being whether or not a contract was in fact made, would it be competent for a witness to testify that he overheard the parties in a conversation, and that in the course of the conversation they made the oral contract in dispute?

§§ 118-121. In an action against a railroad company for an accident at a grade crossing, would it be competent for a witness to testify that the train was running at a dangerous rate of speed; or that the crossing was a dangerous one because of buildings which hid the tracks from view; or that the train was running thirty miles an hour; or that the flagman was drunk?

In an action against a railroad company for injuries sustained in an accident due to the spreading of the rails, would it be competent for an expert constructing engineer to testify that in his opinion the rails were too light; or for a non-expert witness to testify that the ties were rotten?

§§ 122, 123. An action was brought on two promissory notes. The defense to one of the notes was that the maker's signature was a forgery, but the genuineness of his signature to the other note was admitted and another defense was urged. Would it be competent for an expert witness who had never seen the defendant write and could not identify either of the signatures to testify that the two signatures were alike?

§§ 124, 125. In a prosecution for homicide, the defense being insanity, an expert witness was asked a long hypothetical question embodying all the evidence presented on the question of insanity and concluding with the interrogation whether or not, in his opinion, assuming that the facts were as stated, the accused was guilty. Was the question proper?

§§ 128, 129. The owner of a saw-mill made a written contract with a neighboring farmer to saw a lot of logs lying upon the latter's land at a price agreed upon, the contract containing several other agreements and conditions on both sides. Later the parties made an oral contract, separate and distinct from the first, relating to other logs owned by the farmer. How might the rights of the saw mill owner on the two contracts be practically affected in case the farmer

should die before performance of either of the two contracts had been completed?

§§ 134, 135. In negotiations for the compromise of an action involving the question of an agent's authority, one of the parties stated that he would pay $500 in settlement of the suit. He also stated that the agent had general authority to do acts of the kind involved in the dispute. Upon the failure of the parties to compromise the suit, and upon a subsequent trial, would it be competent to show either of these statements?

§ 139. Is a witness obliged to obey a subpoena served upon him by the office boy of the attorney for one of the parties?

§ 140. What is a subpoena duces tecum?

§ 142. What is meant by "putting the witnesses under the rule?"

§ 148. What is meant by a "leading question."

§§ 154, 155. A witness who had testified concerning a railroad accident that he had heard no bell rung was asked on cross-examination: "Isn't it a fact that you are a little hard of hearing?" Was the question proper?

§ 160. What is meant by "impeaching the credit of a witness"?

§ 166. An action was brought on a written contract, the defense being that it was void under a statute because made on Sunday. How could it be shown that the day of its execution, which appeared from its date, had fallen on a Sunday?

§ 167. How could a policy of life insurance be enforced if the insured should disappear and the fullest search should fail to disclose any trace of him, or to produce any evidence as to his being either alive or dead?

APPENDIX B.

PLEADING.

§ 1. What is the purpose of the pleadings in a suit?

§ 3. What are the three systems of pleading? In what state was code pleading first adopted?

§ 4. What system of pleading is adopted by the Federal courts?

§§ 6-8. In an action for the wrongful use of an automobile the declaration states that defendant used a certain automobile belonging to the plaintiff. Is the declaration defective if in fact the automobile was rented to the defendant at the time he used it?

A declaration states that defendant agreed to paint plaintiff's fence within two weeks but did not do so. It does not state that performance of the contract was not excused by plaintiff or that plaintiff gave a consideration for defendant's promise. Is the declaration defective?

§ 9. The declaration states that defendant beat plaintiff. The plea states that it was done in self defense. What form of plea is this?

What is a traverse?

§ 10. The declaration states that defendant for a valuable consideration, agreed to build a carriage for the plaintiff and did not do so. The defendant is an infant and infants are not liable on their contracts. The defendant demurs. Will the demurrer be sustained?

§ 11. What kind of an issue is raised by a traverse? Is it decided by the court or jury?

Why is there no need for further pleadings after a demurrer?

§ 12. Plaintiff brings suit against an express company for failure to deliver in time a package containing an old insurance policy, together with an application for a paid up policy, in consequence of which the right to the paid-up policy was lost. The company in its plea states that plaintiff's claim was not made at the company's shipping office within the time limited therefor by the express receipt. How should plaintiff reply if he thinks the defense is not sufficient in law? If the company extended the time in which the claim was to be made? If, in fact, he made the claim within the time limited therefor by the express receipt?

§ 13. The defendant files a traverse to the plaintiff's replication. What is the name of this pleading? Can there be more pleadings after this?

§ 14. Is battery a form of action?

§ 16. What is the purpose of the action of forcible entry and detainer? Is it available against one who has trespassed upon plaintiff's land but who has not remained in possession?

§ 17. What was the purpose of the action of ejectment originally?

§ 18. In an action of ejectment the plaintiff alleges that Jones has title, that Jones leased to the plaintiff, that the plaintiff entered into possession and that Richard Roe ejected him. No notice of the suit is given to Johnson who claims title to the land. Plaintiff obtains a judgment in his favor. Is this conclusive against Johnson? Who is the casual ejector?

§ 19. In the original action of ejectment what did the plea of general issue deny? What was the ground on which it was extended to include a denial of all the plaintiff's allegations?

§ 21. What fundamental objection is there to so broadening the scope of the plea of general issue?

§ 22. In an action for ejectment the defendant wishes to rely upon an affirmative defence. How shall defendant plead in order to be able to set up this defense? If the plaintiff wishes to traverse this defense how must he plead.

§ 23. Plaintiff wishes to sue for $100 damages for breach of a sealed contract in which defendant agreed to work for plaintiff for one year as his private secretary. What form or forms of action can he use?

§ 24. Plaintiff agrees in a simple contract to build a house for defendant. He is to work one year and be paid $1,000. He completes the house and wishes to sue for the $1000. What form or forms of action may he use?

§ 25. In an action of covenant on a contract under seal the defense is that due to the fraud of the plaintiff defendant executed the contract thinking he was making a lease. Can this defense be shown under the plea of non est factum?

§ 26. Why cannot the defense of illegality be shown under non est factum?

In an action of covenant on a sealed contract how must the defendant plead if he wishes to raise the defense that the action

has not been brought within the time allowed by the statute of limitations?

§ 27. How does an action of debt on a specialty differ from the action of covenant on a sealed contract?

§§ 28-30. In an action of debt on a simple contract what defenses require a plea of confession and avoidance?

In an action of debt on a simple contract the declaration alleges that the defendant owes plaintiff $100 for groceries sold and delivered. The defendant demurs. What decision? How must the defendant plead to a declaration as above in order to show as a defense that the groceries had not been sold and delivered?

§ 31. In an action of debt on a simple contract the declaration alleges that the defendant owes plaintiff $500 for 10 tons of iron sold and delivered and that the defendant has not paid. A statute permits set-offs to be shown where notice is given. The defendant gives notice that he is going to prove a set-off and at the trial offers to show that he owes only $400, the plaintiff having delivered 8 tons of iron and not ten. Is this admissible?

§ 32. In an action of special assumpsit the declaration alleges that the defendant made a contract with the plaintiff promising to pay the plaintiff $2,000 if the plaintiff would deliver a certain automobile to the defendant on May 1, 1906, after first demonstrating that the automobile could attain a speed of fifty miles per hour; that on May 1, 1906, the plaintiff was ready and willing to deliver the automobile. The defendant demurs. What decision?

§ 33. How can the statute of frauds be pleaded in an action of special assumpsit?

§§ 35, 36. What was "wager of law"? In what form of action was it allowed?

In an action of general assumpsit the declaration alleges that the defendant owed the plaintiff $200 for work and labor performed and that the defendant refused to pay. The defendant demurs. What decision?

In an action of general assumpsit for money lent the defendant wishes to show that at the time the money was due he made a tender and that the plaintiff refused to accept it. How should the defendant plead?

§ 37. Defendant rents plaintiff's horse and carriage for a week. At the end of this time he refuses to give them up. What action or actions will lie?

§§ 38, 39. Defendant negligently puts up a hanging sign.

While the plaintiff is driving under it, it falls and kills plaintiff's horse. What kind of action will lie? Would the action be different if the defendant let the sign fall while he was holding it, preparatory to attaching it in place? Would it make any difference if the horse at the time was being driven by one who had borrowed it from the plaintiff?

§ 40. At the trial of an action in trespass for injuries to personalty the plaintiff proves that at the time of the injury the goods were in the possession of Johnson who had rented them for a year. Is this sufficient to support the declaration? Suppose the goods were in the possession of Wilkes, who had sold them to the plaintiff but not yet delivered them?

§ 42. In an action for trespass to realty the defendant wishes to show that he trespassed upon the land upon the invitation of the plaintiff. How should he plead? How should he plead in order to show that he entered under authority of a legal writ?

§ 43. In an action on the case for negligence what must be alleged in the declaration in regard to the defendant's negligence?

§ 46. The declaration is in case for negligently running the defendant's street car over the plaintiff. The defendant wishes to rely on the following facts as defenses: (1) That neither the defendant nor any of its agents were in charge of the car; (2) that the plaintiff was contributorily negligent; (3) that the plaintiff suffered no damage; (4) that the suit was not commenced within the time allowed by the statute of limitations. What pleas should the defendant use?

§ 47. In an action of trover the plaintiff alleges that he is the owner of a piano which he describes and that the defendant played on the piano without his permission. Is the declaration sufficient?

§ 49. To support a declaration in replevin the plaintiff proves that he has title to the goods by showing a deed from the previous owner. Is this sufficient?

§ 50. In an action of replevin how should the defendant plead in order to show as a defense that he retained the goods because he had a lien upon them?

§ 51. In an action of replevin how should the defendant plead in order to show that the plaintiff did not have title to the goods?

§ 54. A declaration in general assumpsit fails to state that the defendant promised to pay. What kind of defect is this?

§ 55. What is the general rule in regard to the construction of pleadings?

§ 56. Plaintiff brings an action against the defendant for slander. In one plea the defendant says that the plaintiff has no action because the words are true. In another plea he denies having spoken the words. Is the defendant's pleading bad in substance by inconsistency?

In an action for goods sold and delivered the defendant in one plea alleges that there was no sale and in another alleges that the sale was illegal. Is the defendant's pleading bad in substance by inconsistency?

§§ 57-59. A declaration in assumpsit alleged that plaintiff had in his possession papers and writings which clearly showed that the defendant had made a contract with the plaintiff, promising to pay the plaintiff $5,000 if the plaintiff would convey to the defendant the lot on the northeast corner of Madison avenue and Fifty-seventh street, Chicago; that the defendant thereby became bound to pay the said $5,000; that the plaintiff performed everything on his side to be performed; that the defendant was unwilling to pay. What are the objections to this declaration?

§ 60. In an action against the defendant for throwing stones at the plaintiff and hitting him the defendant pleads that he threw them gently. The plaintiff demurs. What decision?

§ 61. An infant is not liable on contracts except for necessaries. In an action for breach of contract the plaintiff in his declaration states that the defendant is an infant. The defendant demurs. What decision? Would it have made any difference if it had also appeared by the declaration that the contract was for necessaries?

§§ 63, 64. In an action for trespass the plaintiff does not allege any damage in his declaration. The defendant demurs. What decision?

In an action for trespass the plaintiff in his declaration alleges that the defendant walked over his land and thereby caused damage. In fact, the defendant in so trespassing destroyed two rare plants worth $100 apiece. The defendant demurs. Judgment for whom? If for the plaintiff, what damages can he recover?

§ 65. Plaintiff brings an action of assumpsit on a bill of exchange for principal and interest. The defendant pleads that the interest is usurious and that therefore the plaintiff cannot recover it. The plaintiff demurs. What decision?

What is the effect of stating evidentiary facts in a replication?

§§ 66-68. The plaintiff brings an action of debt on a simple contract and claims in one count $200 for goods sold and delivered.

The defendant files two pleas, (1) that he paid $100 and (2) that half of the goods were not delivered as alleged in the declaration. The plaintiff demurs. What decision?

§ 69. To a declaration for wrongfully and unlawfully tearing down a flume the defendant pleads that he did not wrongfully and unlawfully tear it down. Is the plea good?

§ 70. The law is that where a testator had a cause of action, and a new promise is made to the administrator the administrator can have a new cause of action on the new promise. Plaintiff sued as administrator on a note to the testator. Defendant pleaded the statute of limitations. The plaintiff replied that the defendant had made a new promise to himself within the time allowed by the statute of limitations. Was there a defect in substance in the plaintiff's pleadings?

§ 71. What takes the place of new assignment in code pleading?

§ 78. Plaintiff, a real estate broker, brings an action to recover the amount claimed to be due him as commissions on a sale of land. The defendant files one plea in which he states that he did not hire the broker and that the broker induced him by fraud to part with the land. Is the defendant's plea defective because of duplicity?

§ 88. Plaintiff brings suit as an administrator. From the declaration it appears that the person whose administrator he claims to be is still alive. Is the declaration defective?

§ 92. What is a speaking demurrer?

§§ 93, 94. Declaration bad in substance. Plea bad in form. General demurrer. Judgment for whom? Would it be different if the plaintiff had filed a special demurrer?

§§ 99-101. In an action for trespass the defendant expressly confesses having committed the trespass but puts in a bad justification. Verdict is given for the defendant. Is this a proper case to give the plaintiff judgment non obstante verdicto?

§ 104. Declaration bad in form. Plea bad in form. Special demurrer. Judgment for whom?

§ 105. In an action of trespass for taking a hook plaintiff does not allege that he was in possession of the hook. The defendant pleads that he took it out of the hands of the plaintiff in self-defense. Is the defect in the declaration cured?

§ 111. Is an amendment regarded as a new suit or as a continuation of the old one in regard to the statute of limitations?

§ 115. Defendant pleads the general issue. At the trial, will he be permitted to show a misjoinder of parties plaintiff?

§ 116. What pleading at common law does the bill in equity correspond to?

§ 118. What are special interrogatories?

§ 119. What is the statement in a bill of equity?

§ 120. Is the jurisdiction clause in a bill of equity essential?

§ 126. A statute permits the plaintiff in an equity action to waive an answer under oath. What is the effect of such a waiver upon the defendant's answer?

§ 129. In what cases may a defendant file a plea to a bill in equity instead of an answer?

§ 135. The defendant puts in an answer and a plea to a bill in equity. Each covers the whole case made by the bill. Will the plea be overruled?

§ 137. How is irrelevant matter in a bill in equity objected to by the defendant?

What is scandal?

§ 140. What is a demurrer ore tenus?

§ 159. Special count on an oral contract. The defendant wishes to prove that since his breach of the contract he has been discharged in bankruptcy. How shall he plead under the codes?

APPENDIX C.

PRACTICE.

§ 2. What is meant by venue?

Would an action lie in a New York court to recover for a balance of rent due upon a lease of an apartment in Chicago, the lessee having abandoned the premises and being found in the city of New York?

§ § 3, 4. In what Federal district should an action be brought by a citizen of Illinois against a citizen of Wisconsin? Would an action lie in one of the districts of Indiana if no objection were made by the defendant?

§ § 11, 12. Two residents of Illinois wishing to try the title to a piece of land in Indiana, one of them brought an action of ejectment in an Illinois court against the other, whose agent was in possession of the premises. If the defendant raised no objection to the jurisdiction would a judgment of the Illinois court be valid? Could an objection to the jurisdiction afterwards be raised in a reviewing court?

§ § 14, 15. Does a court acquire jurisdiction over a defendant who is not served with process, if he has knowledge of the pendancy of the suit and does not appear and object?

§ 23. How should a summons be served upon a resident defendant if there is no statute relating to the matter?

§ § 25-27. In an action in an Illinois court against several defendants service was had upon one of them, a resident of Michigan, in Illinois, while he was passing through the state; upon another, a resident of Illinois, in Iowa, while he was temporarily in Iowa. Which service, if either, was valid?

§ 35. In what kinds of proceedings can the courts acquire jurisdiction over non-resident defendants who can not be personally served with process in the state?

§ 39. In a proceeding against a non-resident defendant to satisfy a claim for $1,000, property of the non-resident was attached and sold for $500, the proceeds being paid to the plaintiff. If an action is afterwards brought against the debtor in the state of his residence to collect the balance of the debt, how are the merits of the case affected by the result of the first action?

§§ 45-49. An action was brought in a state court of Ohio against a resident of New York, and service was had upon an agent of the defendant who resided in Ohio and carried on the defendant's business there. The defendant made no defense and judgment was given against him by default. Was the judgment valid?

In an action against a corporation service was had upon Gray who happened to be in the principal office of the corporation on business and who the officer supposed was one of the corporation's agents, but who was entirely disconnected from the management of the corporation's business. The officer's return on the summons stated that service had been made upon the corporation by delivering a copy of the summons to A. V. Gray, its manager. How can the defect in the service be shown?

§§ 52-54. In an action for slander, what would be the effect upon the proceedings and upon the rights of the parties by the death of the defendant before judgment?

What would be the effect in an action upon a written contract to recover a balance of money due?

§ 60. An examination of jurors developed the fact that they had been chosen from the voting lists by the clerk of the court, instead of by the sheriff as required by law. How should they be objected to?

§§ 64, 65. In a state where a judge is limited to instructing the jury exclusively upon the law applicable to the cause, in a personal injury suit a judge after telling the jury that they were the ultimate judges of the facts, instructed them that they were justified in giving greater weight to the testimony of a certain witness than to that of another. Was the instruction good?

§ 67. How is a judgment distinguished from a verdict?

§§ 68, 69. When should a motion for a new trial be made?

Plaintiff brings a personal injury suit for $500 damages. The jury awards him a verdict of $100. The plaintiff asks for a new trial on the ground that the verdict is contrary to the facts. A new trial is refused. Has the plaintiff any further remedy?

§§ 71-73. Plaintiff obtains a judgment for $2,000 against the defendant. An execution is issued and it is returned by the sheriff indorsed, "No property found." The defendant has property worth $1,000 subject to execution, which he has hidden, and he also has an equitable interest in realty worth $1,000 which is not subject to be taken under an execution. What can the plaintiff do?

§ 75. What is a bill of exceptions?

§ 76. What is the difference between an appeal and a writ of error in regard to the jurisdiction of the reviewing court?

§ 78. A judge admits incompetent evidence. A new trial is granted and the judge admits the same evidence. What can the aggrieved party do?

APPENDIX D.

LEGAL ETHICS.

§ 5. A lawyer is retained to defend a client who is accused of having robbed a bank. The newspapers reporting the crime have published widely the fact that the stolen property consisted of a new issue of bank notes which had not yet been put into circulation. Upon taking the case the lawyer is paid a large sum of money as a retainer, and afterwards, but before the trial, he notices that the money paid him consists entirely of bills answering the description of those stolen. What is his duty in the premises?

Suppose in the preceding case that the accused confesses his guilt to his own attorney. What is the duty of the latter in the premises?

Gray, who had been a man of good reputation and standing in the community, and had always been honored and respected, is accused of embezzling church funds which had been entrusted to him. In an interview with the state's attorney, he professes his innocence, and the state's attorney honestly believes him to be innocent. What is the duty of the state's attorney in the premises?

§ 6. Lawyer Johnson represents a bankrupt whose assets are scheduled at $2,000, and whose liabilities are $1000. He knows that if the business can be kept going until the assets are disposed of to good advantage, they will bring their scheduled value, but that if they are sold at a forced sale, they will bring only $900. He secures from the bankrupt a list of all the creditors and gives it to lawyer Brown, who thereupon calls upon a majority of the creditors and offers to represent them in the matter of their claims, which they allow him to do. The two lawyers had previously agreed that the bankrupt should not be pushed, but should be allowed to continue his business until he could close out to advantage. The creditors knew nothing of the agreement between the lawyers, and most of those who gave their claims to Brown supposed that he would secure a dividend from the estate as soon as possible. Is either lawyer guilty of unprofessional conduct?

§§ 8-10. A client wishes to recover $500 damages for a personal injury done to him by Jones. His lawyer tells him that he will

not be able to recover more than $100 in a suit and advises him to settle. The lawyer offers to make the negotiations for settlement if he can have all over $100 that he gets. The client agrees to this and the lawyer goes to Jones, who is represented by counsel, and tells him that his client is about to begin suit for $1,000 which he surely will be able to recover, but to avoid the expenses of a suit he is willing to settle for $500. Jones pays the lawyer the $500. The lawyer keeps $400 and gives the balance to his client. Has the lawyer violated any of the rules of legal ethics?

§ 19. A lawyer witnesses an accident in the street. He goes to the injured man and asks to be retained as counsel saying that he is especially qualified to take the case, having witnessed the whole thing. Should this action be condemned?

§ 26. A lawyer for a large corporation seeks to have an eight hour labor law passed knowing that the corporation will employ him to test its constitutionality. Can any fault be found with his conduct?

§ 29. A lawyer thinks that a witness on the other side has committed perjury but is also sure that it has had no effect on the outcome of the suit. What is his duty?